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The Evolving Law of Payment by Wire Transfer—An Outsider's View of Draft UCC Article 4A

Benjamin Geva

Osgoode Hall Law School of York University, bgeva@osgoode.yorku.ca

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**THE EVOLVING LAW OF PAYMENT BY WIRE
TRANSFER — AN OUTSIDER’S VIEW OF DRAFT UCC
ARTICLE 4A**

Benjamin Geva *

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* Associate Professor of Law, Osgoode Hall Law School, York University, Toronto. Copyright © 1988, Benjamin Geva. This article is based on a paper presented at the 17th Annual Workshop on Commercial and Consumer Law held at the Faculty of Law, University of Toronto, on October 16-17, 1987. For reactions, I am obliged to the two Workshop commentators, Carl Felsenfeld and Kevin McGuinness. For research assistance, I am grateful to Harold Olij, Stephanie Cheung and Pearl Greenbaum. [Professor Felsenfeld’s Comments on Professor Geva’s original Workshop paper are reproduced, *infra* at p. 235. [Ed.]]

Introduction

(1) Basic Concepts

A typical payment by wire transfer is initiated by a paying party ("sending customer")¹ instructing his bank² ("originating bank") to carry out payment to the account of another party ("beneficiary") with a bank ("destination bank"). In an international transaction, where both banks are distant from each other, the interbank message is usually transmitted by cable, telex or wire. This is where the name "wire transfer" comes from.

Payment by wire transfer is executed by the originating bank debiting the account of the sending customer and by the destination bank crediting the account of the beneficiary. Interbank settlement takes place either through a correspondent account maintained by one bank for another, a network settlement account maintained for all participating banks, or, in domestic transfers, on the books of the central bank. Where the two banks are not linked by any of those settlement facilities, the originating bank must employ a correspondent bank to transmit the payment message. Such a correspondent will transmit either directly to the destination bank or, depending on the availability of mutual settlement facilities, *via* another intermediary. In principle, each bank sending an interbank payment message ("transmitting bank") must have a settlement facility with the bank receiving the message ("receiver"), in the form of a correspondent account, a network settlement account, or on the books of the central bank. Accordingly, the number of banks involved in each wire payment depends on the availability of pertinent relationships to be utilized between the originating and destination banks.³

Conceptually, the wire transfer payment is a species of giro system. "GIRO" is derived from the Greek word for circle. It denotes the cyclic operation involved in the transfer of credit balances from one bank account into another.⁴ Giro payments are

¹ In the absence of governing statutory rules, terminology used is far from uniform or consistent. The terminology adopted in this article attempts to conform to that of UCC Draft Article 4A (cited in footnote 42, *infra*).

² Throughout this article, "bank" is broadly used to denote any depository financial institution.

³ For a description of the operation of the domestic "telex" transfer of funds in Canada, where no intermediaries separate the originating and destination banks, see S. Goldstein *Changing Times; Banking in the Electronic Age* (1979, Report prepared for the Government of Canada), pp. 114-15.

⁴ See, e.g., E.P. Ellinger, "The Giro System and Electronic Transfers of Funds", [1986] L.M.C.L.Q. 178.

either credit or debit transfers. In the former, the paying party's instructions are communicated by him directly to his bank so as to "push" funds from his account to that of the payee. In the latter, the paying party's instructions are communicated to his bank by the payee *via* his own bank so as to "pull" or "draw" funds from the paying party's account into that of the payee.⁵ Wire payment is thus a method of credit transfer of funds.

Payment systems, whether credit or debit transfers, are either paper-based or electronic funds transfers, depending on the medium embodying the payment instructions.⁶ Electronic payment is a generic term for any fund transfer or payment mechanism that relies primarily on computerized communication systems rather than paper instruments.⁷

In the broad sense, the wire payment, as a species of credit transfer, can operate either as a paper-based or as an electronic system.⁸ Nevertheless, it is the electronic dimension which has recently given the wire transfer its present prominence. The most important attribute of a wire payment service is the underlying communication system facilitating speed, single transaction focus, and great security. This makes the wire payment rather expensive and suitable primarily for large corporate payments.⁹

(2) The Current Law

There is an overall consensus that the rules governing credit transfers are poorly developed or, at least, that in many respects they are unsettled.¹⁰ There is no consensus either as to the particular legal doctrine from which the relevant rules should be derived. Legal relationships and finality of payment have generated the most extensive judicial as well as academic analysis.

According to Penney and Baker, most American courts characterized the sending customer-originating bank relationship as one of agency.¹¹ American courts have held the originating bank liable

⁵ See, in general, B. Geva, "The Concept of Payment Mechanism" (1986), 24 O.H.L.J. 1, at pp. 6-7.

⁶ *Ibid.*

⁷ For this definition, see B.K. Stone, "Electronic Payment Basics" (1986), 71 Ec. Rev. Fed. Res. Bank of Atlanta 3:9.

⁸ Indeed, the interbank payment instructions can be communicated by ordinary mail.

⁹ See Stone, *supra*, footnote 7, at p. 10. The alleged "low cost" feature of the wire payment (see, e.g., text, *infra*, around footnote 183) is in relation to the amount of the average wire payment and not as compared to other payment systems.

¹⁰ For this point see works cited below as well as H.S. Scott, "Corporate Wire Transfers and the Uniform New Payments Code" (1983), 83 Colum. L. Rev. 1664.

¹¹ N. Penney and D.I. Baker, *The Law of Electronic Fund Transfer Systems* (Boston, New

to the sending customer for losses resulting from delay, failure of its correspondent to follow instructions, failure to effect credit at all, and impossibility of performance.¹² No consensus has emerged as to the beneficiary's position in the funds transfer, whether as a third party beneficiary or as assignee.¹³ American courts have not hesitated to fasten liability on an intermediary bank acting as the originating bank's correspondent for the failure to carry out the wire payment, though only for reasonably foreseeable loss.¹⁴ Finally, judicial efforts in the United States to determine time of payment have not produced any consensus as to the particular time when "finality" is reached.¹⁵

In discussing the nature of relationships created by credit transfers, Bradley Crawford concludes that a simple banking relationship provides the link between the sending customer and the originating bank as well as between the beneficiary and the destination bank.¹⁶ Crawford is quite skeptical as to the wholesale applicability of agency concepts to any of these two relationships.¹⁷ In general, his view is that particularly in determining finality of payment,¹⁸ the evolving law of credit transfers should give great deference to banking practice. In his view, private agreements, between a customer and his banker as well as among banks, are also an important source of rules governing credit transfers.

Professor Ellinger provides a detailed analysis from an English perspective.¹⁹ Dealing with the legal nature of money transfer orders, he observes that unlike the case of cheques and their clearance, "no certainty . . . prevails in respect of money transfer orders."²⁰ In his view, "[o]nly three points can be asserted with confidence."²¹

York, Warren, Gorham & Lamont, 1980), pp. 24-8 to 10 (with 1986 Cum. Sup. by D.J. Baker and R.E. Brandel, assisted by D.E. Feld).

¹² Authorities are cited by Penney and Baker, *ibid.*, at p. 24-10 and footnotes 22 to 25.

¹³ *Ibid.*, at pp. 24-14 to 16.

¹⁴ Penney and Baker, Cum. Sup., *supra*, footnote 11, at pp. S24-2 to 6. The leading case is *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820 (N.D. Ill., 1981), *revd* 673 F.2d 951 (7th Cir., 1982), *cert. denied* 103 S. Ct. 377 (1983). However, in that case (discussed in text, *infra*, around footnotes 180 to 182) loss was not found to be reasonably foreseeable.

¹⁵ Penney and Baker, *supra*, footnote 11, at pp. 24-26 to 21.

¹⁶ B. Crawford, *Crawford and Falconbridge Banking and Bills of Exchange*, 8th ed. (Toronto, Canada Law Book Inc., 1986), Vol. 1, pp. 1017-28.

¹⁷ On this point he is in agreement with R. King, "The Receiving Bank's Role in Credit Transfer Transactions" (1982), 45 Mod. L. Rev. 369.

¹⁸ Crawford, *supra*, footnote 16, at pp. 1028-35.

¹⁹ *Supra*, footnote 4, at pp. 195-205.

²⁰ *Ibid.*, at p. 195.

The first is that the documents used in money transfer payments are not negotiable instruments.²² They do not comply with the statutory requirements of Bills of Exchange Acts or of Article 3 of the Uniform Commercial Code. Thus, the giro form is typically payable neither at a determinable future time nor on demand, is payable neither to the order of a specified person nor to the bearer, and does not include formal instructions by the sending customer to the originating bank.²³ Also, the initiation of a money transfer payment does not require a written document. Hence, the law of negotiable instruments is inapplicable to the wire transfer payments.

The second point, according to Ellinger, is that the law of assignment of debts is, "in all probability",²⁴ inapplicable. Stated otherwise, the money transfer order does not by itself operate as an assignment of funds in the originating bank's hands in favour of the beneficiary or his bank.²⁵

The third point, which is the "only positive rule",²⁶ is that for most purposes the relationships of the parties to money transfer orders are governed by the law of agency. "[M]oney transfer orders involve a string of operations carried out by the different banks acting in a representative capacity."²⁷

As the sending customer's agent,²⁸ the originating bank is obliged to carry out the instruction given to it with reasonable skill and care, though not with "strict compliance" as under documentary letter of credit law.²⁹ This duty can be broken down to three specific obligations: (a) the amount must be transferred on time; (b) the originating bank must engage a reliable cor-

²¹ *Ibid.*

²² On this point, Professor Ellinger must have been referring to documents embodying the sending customer's instructions.

²³ *Supra*, footnote 4 at pp. 196-7. Ellinger contends that the third ground is the "most important ground for denying that a bank giro credit is a negotiable instrument". *Id.*, at p. 197. In my view this is an exaggeration. Also the standard cheque form does not include explicit formal instructions.

²⁴ *Ibid.*, at p. 195.

²⁵ *Ibid.*, at pp. 197-9. On this point see also the detailed analysis of R.R. Pennington, A.H. Hudson and J.E. Mann, *Commercial Banking Law* (1978), pp. 283-91.

²⁶ Ellinger, *supra*, footnote 4, at p. 195.

²⁷ *Ibid.*, at p. 199.

²⁸ See, *ibid.*, at pp. 199-202.

²⁹ On that point the leading authority is *Royal Products Ltd. v. Midland Bank Ltd.*, [1981] 2 Lloyd's Rep. 194 (Q.B.).

espondent in the transmission of the money transfer order, and, except for where a contractual disclaimer applies, it is vicariously liable for the negligence or default of its correspondent;³⁰ and (c) the duty of care is owed only to a sending customer who is the originating bank's customer and not a stranger employing it.³¹

The correspondent transmitting bank is engaged by the originating bank. In English law, as there is no privity of contract between a principal and a sub-agent, the transmitting correspondent is not liable to the sending customer.³² The opposite rule applies in the United States. In *Evra Corp. v. Swiss Bank Corp.*,³³ a transmitting correspondent that had failed to carry out the transfer was held liable to the sending customer for breach of contract and negligence.³⁴

The agency position of the destination bank is less clear.³⁵ While generally employed by the beneficiary, the destination bank may also fulfill functions on behalf of either the sending customer or the originating bank.³⁶ Drawing lines is not always an easy task.³⁷

Professor Ellinger concludes by addressing questions relating to time of payment and countermand.³⁸ He concedes that "[t]he analysis of the legal relationships of the parties to money transfers does not furnish a decisive answer to the question of when the order is executed."³⁹ Accordingly, he proposes to divide cases into two groups: those dealing with countermand of payment, and those determining the exact time of payment between the sending customer and the beneficiary. His analysis of existing case law leads him to the conclusion that a money transfer cannot be countermanded when funds become available to the destination

³⁰ On that point, in connection with the banker-customer relationship in general, the leading authority is *Equitable Trust Co. of New York v. Dawson Partners Ltd.* (1926), 27 Ll. L. Rep. 49 (H.L.).

³¹ This is relevant where the originating bank accepts a transfer order from a stranger due to an arrangement between the originating bank and the destination bank. In effect such an arrangement is for the benefit of the beneficiary.

³² Ellinger, *supra*, footnote 4, at p. 202.

³³ *Supra*, footnote 14.

³⁴ Other aspects of this decision are discussed, *infra*, in Part 3(2), text around footnotes 179 to 183.

³⁵ Cf. King, *supra*, footnote 17.

³⁶ Cf. Ellinger, *supra*, footnote 4, at p. 204, raising the question of the destination bank's liability to the sending customer for failure to carry out the payment.

³⁷ Ellinger, *ibid.*, at pp. 203-05.

³⁸ *Ibid.*, at pp. 205-16.

³⁹ *Ibid.*, at p. 205.

bank on behalf of the beneficiary. However, payment to the beneficiary is completed only when the funds become available to the beneficiary himself.

Overall, the preceding analysis indicates the inadequacy of existing rules in providing certainty and a comprehensive body of law governing wire transfer payments. Several points deserve particular attention.

To begin with, there is no consensus as to the applicability of agency law. Even if relationships created by credit transfers are governed by agency law, its exact application is far from certain. For example, each participating bank may perform some functions for the sending customer, some for the beneficiary, some for another bank, and others on its own behalf. However, classification in any instance may be impossible.

Secondly, English law governing the liability in negligence of a correspondent transmitting bank may prove to be unsatisfactory. If there is no privity between the sending customer and the correspondent and assuming the originating bank's vicarious liability may be effectively disclaimed, what recourse does the sending customer have against the correspondent's deficient performance? A related question is the measure of damages. No comprehensive body of law has developed providing for the scope of liability for defective performance of banks' duties.

Thirdly, cases dealing with finality of payment are not easy to reconcile.⁴⁰ It is submitted that Ellinger's suggestion of distinguishing between cases dealing with the revocability of the transfer order and cases concerned with the completion of "cash" payment between the sending customer and the beneficiary⁴¹ is a step in the right direction. None the less, even this approach is clouded with much uncertainty. For example, the availability of funds to the destination bank requires determination of the binding effect of the interbank payment instructions. Availability of funds to the beneficiary requires the determination of several other questions, such as the duty of the destination bank to accept a credit transfer for its customer, the time when the destination bank is required to credit the customer's account with the amount

⁴⁰ The leading case is *Momm v. Barclays Bank Int'l Ltd.*, [1977] Q.B. 790. Another attempt to summarize and reconcile cases, in addition to those attempts referred to above, is by A. Tyree, "Electronic Funds Transfer in New Zealand" (1978), 8 N.Z.U.L. Rev. 139, at pp. 145-50.

⁴¹ See text, *supra*, around footnotes 38 and 39.

of the credit transfer, and whether such credit is reversible upon the destination bank's failure to obtain settlement for the credit transfer.

Finally, the case law has not yet discussed extensively a substantial number of questions. These include the allocation of losses for unauthorized or altered credit transfers, mistakes in the course of transmitting transfer orders, and erroneous instructions. It is not suggested that common law doctrine is not sufficiently robust and flexible to provide adequate answers. However, the process is likely to be slow, uncertain, and unpredictable. On the other hand, the increasing volume and importance of wire transfers requires certainty as to parties' duties and the allocation of losses as well as consistency in terminology.

Comprehensive legislation is a better way of resolving these difficulties. Draft Article 4A of the American Uniform Commercial Code⁴² is one such model. It is designed to serve as "a framework for future development of commercial practice and law, as well as a codification of existing practice and law"⁴³ and will be the focus of the present article.⁴⁴

(3) Scope of this Article

This article examines the provisions of Draft Article 4A in light of existing common law rules as well as relevant policies. Article 4A is still at the drafting stage⁴⁵ and it is therefore premature to

⁴² Drafted under the auspices of the National Conference of Commissioners on Uniform State Laws. The current text is a Draft for Discussion Only, dated September 28, 1987. A previous draft was presented in December, 1986, and circulated on March 13, 1987 by the Reporters Robert L. Jordan and William D. Warren to the Drafting Committee on Amendments to Uniform Commercial Code — Current Payments Methods (hereafter "a Previous Draft"). An earlier text was commented on by T.A. Beckett and K.S. Dighe, "Wholesale Wire Transfers Under Draft Article 4A of the Uniform Commercial Code" (1987), 1 B.F.L.R. 373. All references in this article, unless indicated otherwise, are to the current text (of September 28, 1987).

⁴³ Beckett and Dighe, *ibid.*, at p. 373.

⁴⁴ The Article 4A project emerged with the abandonment of plans to implement the Uniform New Payments Code. The latter had a more ambitious design as it purported to cover all payment systems and to replace UCC Article 4 as well as some federal legislation, and furthermore, to supersede UCC Article 3 with respect to payment instruments, including cheques. See Permanent Editorial Board of the UCC, *Uniform New Payments Code*, P.E.B. Draft No. 3 (marked-up version showing changes from Discussion Draft No. 8, June 2, 1983), and for a discussion, H.S. Scott, *New Payment Systems: A Report to the 3-4-8 Committee of the Permanent Editorial Board for the Uniform Commercial Code* (1978).

⁴⁵ The next Draft is expected to be published around February, 1988.

write a detailed commentary on its provisions. This article is therefore primarily concerned with the basic concepts of Article 4A, concepts which have pretty much been finalized. The ultimate objective of the article is to set the stage for a comprehensive discussion on whether the rules provided by Article 4A serve as firm foundations for the evolution of wire transfer payment law.

Part 1: General Provisions and Definitions

The first section, 4A-101, provides for a "short title" to Article 4A, that is, "Uniform Commercial Code — Wire Transfers".

Under s. 4A-102, Article 4A applies to "transactions for payment pursuant to transfer orders". Several exceptions are enumerated in s. 4A-104. They consist of transactions in which the payment instructions are either embodied in commercial paper, including cheques or drafts, governed by Article 3, or initiated by means of credit or debit cards,⁴⁶ as well as transactions where a bank is instructed by a creditor to draw or collect from the debtor, that is debit transfers, and consumer electronic payments governed by the federal Electronic Fund Transfer Act ("EFTA").⁴⁷

All business credit transfers,⁴⁸ whether paper-based or electronic,⁴⁹ thus fall within the scope of Article 4A.⁵⁰ In fact, this is broader than the standard "wire transfer" payment suggested by the title of Article 4A.⁵¹

⁴⁶ Comment 1 rationalizes this exclusion as premised on the similarity between payment by card and payment by cheque. The Comment's position in the Previous Draft, under which credit cards "are covered by Federal statutes" (see also second paragraph of the Prefatory Note to the current Draft Article 4A) should be taken with a grain of salt. Existing incomplete statutory coverage of credit cards does not parallel the comprehensive coverage given to instruments under Articles 3 and 4.

⁴⁷ 15 U.S.C. s. 1693 (Title XX, Public Law 95-630, 92 stat. 3728). The statute is implemented by Regulation E, 12 C.F.R. Part 205 (1981). In fact, neither the EFTA nor Reg. E deals with the funds transfer as opposed to the consumer protection aspects of consumer electronic payments. The rationale for the latter exclusion is thus not entirely clear.

⁴⁸ A "credit transfer" is initiated by payment instructions communicated directly by the paying party to his bank, so as to "push" funds to the recipient's bank account. See, in general, in the context of a discussion on the general framework of the transmission of money, Geva, *supra*, footnote 5, at pp. 3-10, particularly at p. 6.

⁴⁹ See Comment 3 to s. 4A-103.

⁵⁰ The point is reinforced by the definition of "transfer order" under s. 4A-103(1)(j), discussed, *infra*, in the text which follows footnote 52.

⁵¹ See Introduction (1), *supra*. The widespread use of the "wire" mode of communication explains the title of Article 4A: See Prefatory Note at p. 2. The large amount and the

The Comment to s. 4A-102 identifies “transfer order” as the crucial definitional term determining the scope of Article 4A.⁵² Under s. 4A-103(1)(j), “[t]ransfer order” is

an instruction transmitted to a bank^[53] to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if, pursuant to the terms of the order, the destination bank is unconditionally permitted to pay the beneficiary (i) on receipt by that bank of an instruction to pay or (ii) on a day stated in the instruction.^[54]

The definition goes on to state that a transfer order “may be transmitted by any means, including an oral, written or electronic communication”. It further provides that where the instruction is to make more than one payment, “the instruction is a separate transfer order with respect to each of the payments.”

According to Comment 2 to s. 4A-103, since “transfer order” is defined as “an instruction transmitted to a bank to pay, or to cause another bank to pay”, Article 4A is limited to a payment made through the banking system. This reads into the definition the drafters’ intent that the instruction must be communicated by the paying party directly to his bank, and not *via* the payee.⁵⁵ Also, to the extent that payment must be made “unconditionally”, Article 4A does not cover payments to be made against the presentment of complying documents, as required in a standard documentary letter of credit transaction.⁵⁶ As the Comment explains, wire transfers are characterized by “low price and high speed”; banks’ functions thereunder are thus “essentially mechanical in nature”.⁵⁷

business nature of the typical payment account for another name given to this mode of payment: “wholesale wire transfer”. See Prefatory Note at p. 1.

⁵² The pertinent part of s. 4A-102 is quoted, *supra*, at the beginning of the paragraph containing footnote 46. The centrality of the term is also highlighted on p. 3 of the Prefatory Note.

⁵³ “Bank” is broadly defined in UCC 1-201(4) as “any person engaged in the business of banking”. UCC 4-105, to which s. 4A-103(4) misleadingly refers, defines bank roles in the collection system, such as “collecting bank”, “payor bank”, or “presenting bank”.

⁵⁴ Needless to say, the definition is to be read in light of the scope of the Article, as discussed above. See also discussion, *infra*, around footnotes 55 to 57.

⁵⁵ This distinction between direct communication and communication *via* the payee underlies the difference between credit and debit transfer. See citation, *supra*, in footnote 48. Also, the cheque is a payment instruction to a bank though as a debit transfer, it is communicated to the payor bank *via* the payee.

⁵⁶ It also does not cover payments to be made against a demand. The analogy made in Comment 2 to s. 4A-103 between the banks’ role in wire transfers and cheque collections is thus not well thought out.

⁵⁷ Comment 2 to s. 4A-103.

The terms "beneficiary" and "destination bank", which appear in the definition of "transfer order", are specifically defined in s. 4-103(1). Paragraph (a) defines "beneficiary" as "the person to whom, or to whose account, payment is to be made pursuant to a transfer order." The "beneficiary" is thus the ultimate payee under the transfer order. Paragraph (c) defines "destination bank" as "the bank that is to make payment to the beneficiary pursuant to a transfer order". Putting it another way, the "destination bank" is the beneficiary's bank.

As stated in s. 4A-102,⁵⁸ what falls within the ambit of Article 4A is "transactions for payment pursuant to transfer orders". Hence, each "transfer order" is to trigger a "transaction for payment". Presumably, "transaction for payment" is the equivalent of "payment transaction",⁵⁹ defined in s. 4A-103(1)(f) as "the series of transactions, commencing with the sending customer's transfer order, that are made to effect payment to the beneficiary of that order".

In practice, an interbank payment message may be in the form of a bill of exchange.⁶⁰ Payment by wire transfer may thus include a link which falls outside the scope of Article 4A. Unfortunately, the statute is silent as to the interaction between its provisions and outside sources of law under such circumstances. There may also be doubts as to whether Article 4A applies at all to a "payment transaction" where "the series of transactions" "pursuant to transfer orders" is interrupted by payment instructions falling outside the deliniation of "transfer order".

The "sending customer" referred to in s. 4A-103(1)(f), must be taken to mean the party who initiates payment to the beneficiary, that is, the payor, or the paying customer, normally the beneficiary's debtor. Nevertheless, to confirm this conclusion one has to work carefully through several definitions. Thus, "sending customer" is defined in para. (i) of s. 4A-103(1), as "a sender that is not also a transmitting bank in the payment transaction". "Sender" under para. (h), is "the issuer of a transfer order". Under para. (e), a transfer order is issued "when it is received by the receiver".

⁵⁸ See, *supra*, at the beginning of the paragraph containing footnote 46.

⁵⁹ This definitional inconsistency is of course unfortunate.

⁶⁰ Apparently such was the "payment order" used in *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corp. of Liberia* ("The Laconia"), [1977] A.C. 850 (H.L.).

However, this identifies the time of "issue" and not the identity of the "issuer". The "issuer" under para. (h) is not the "receiver", but rather the "sender" which,⁶¹ by causing the "receiver" to receive the transfer order, causes the transfer order to be "issued" by the sender. This conclusion is supported by para. (g) defining "receiver" as "the bank to which a transfer order is issued and is either a transmitting bank or the destination bank". "Transmitting bank", referred to in the definition of "sending customer" as well as "receiver",⁶² is defined in para. (k) of s. 4A-103(1) as "the receiver of a transfer order if the execution of the order requires the receiver to issue a transfer order to another bank". Under s. 4A-103(1)(d), a sender's transfer order is "executed" when "the receiver, if it is a transmitting bank, issues a transfer order intended to carry out the sender's transfer order." Hence, the issuer of the first transfer order in the payment transaction, that is, the beneficiary's debtor, is the "sending customer".

A "payment transaction" is thus facilitated by a string of separate "transfer orders". Each "transfer order" is "issued" by its "sender" upon its receipt by the respective "receiver" and is "executed" when the "receiver", which is a "transmitting bank", issues a transfer order intended to carry out the respective sender's transfer order.⁶³

A bank may initiate a wire transfer to make a payment for its own account and not for a customer.⁶⁴ Such a bank acts then as a "sending customer" and falls outside the definition of "transmitting bank".⁶⁵ By the same token, a bank may be the beneficiary of a transfer order. Such a bank "is the destination bank as well as the beneficiary".⁶⁶ In connection with transfers between two accounts of the same entity, such an entity is the "sending customer" as well as the "beneficiary".⁶⁷

⁶¹ Since parties to large dollar wire transfers are typically corporate customers, this article refers to them as "it" or "which", rather than "he", "she" or "who".

⁶² Paragraphs (i) and (g) respectively.

⁶³ For the time, under those circumstances, when payment is made by the sending customer to the beneficiary, by the destination bank to the beneficiary, as well as by a sender to a receiver, see discussion, *infra*, in Part 3(3).

⁶⁴ "Customer" is defined in s. 4A-103(1)(b) as "a person having an account with a bank or from whom a bank agreed to receive transfer orders and includes a bank having an account with another bank".

⁶⁵ See definitions in paras. (i) and (k), and the last paragraph of Comment 1 to s. 4A-103.

⁶⁶ Section 4A-103(1)(c).

⁶⁷ See the last paragraph of Comment 1 to s. 4A-103. For an example of such a transfer, see *Royal Products Ltd. v. Midland Bank Ltd.*, [1981] 2 Lloyd's Rep. 194 (Q.B.).

In general, each "payment transaction" is initiated by a "transfer order" issued by the "sending customer". Each bank, not initiating payment for its own account, except for the beneficiary's bank (that is, "destination bank") is a "transmitting bank". There is neither a special name nor definition to what is commonly known as the "originating bank", that is the first bank to which a "sending customer" issues a "transfer order".⁶⁸ In an in-house payment or "book transfer",⁶⁹ that is, where the "sending customer" and the "beneficiary" maintain accounts at the same bank, the bank involved falls into the definition of "destination bank". It is not a "transmitting bank".⁷⁰

An important qualification to the terms "sender" and "receiver" applies where a transfer order is made by a bank through a "wire transfer system". Under s. 4A-103(2), such a system falls outside the definition of "sender" and "receiver". This provision particularly excludes Federal Reserve Banks acting as the intermediate "wire transfer system" in FedWire.⁷¹ In a FedWire transfer between a "transferor" and a "transferee" banks, as defined in the rules governing FedWire,⁷² a transfer order is issued when the transferee's account is credited at its Reserve Bank.⁷³ "Wire transfer system" is broadly defined in s.

⁶⁸ See, *supra*, Introduction (1), text around footnotes 1 and 2.

⁶⁹ See Case #1 in Comment 1 to s. 4A-103.

⁷⁰ Comment 1 to s. 4A-103 uses a series of cases to demonstrate how the terminology of the section applies to concrete fact situations. Payment is to be made by X to Y. X's account is with Bank A. Y's account is either with Bank A (Case #1) or with Bank B (Cases #2 and #3). Where Bank A is required to issue a transfer order to Bank B, it can do it either directly (Case #2), or, in the absence of any correspondent relationship with it, *via* Bank C (Case #3).

⁷¹ In general for FedWire, see B. Geva, "FedWire Transfer of Funds" (1987), 104 *Banking L.J.* 412.

⁷² These rules are contained in Subpart B of Regulation J., 12 C.F.R. §210, as amended and supplemented by operating circulars. See Geva, *ibid.*, at p. 413. The "transferor" under Reg. J. is "sender" under Article 4A, and the "transferee" is "receiver".

⁷³ Thus, under s. 4A-103(2), "[t]he transfer order is issued when final payment is made to the receiver by the Federal Reserve System." In a FedWire transfer, payment is carried out essentially by a debit to the sender/transferor's account in its Reserve Bank, payment message from the sender/transferor's Reserve Bank to the receiver/transferee's Reserve Bank and credit to the receiver/transferee's account with its Reserve Bank, of which the receiver/transferee is to be advised. At this point the beneficiary's account with the destination bank (receiver/transferee) is to be credited. Credit to the receiver/transferee's account is final as soon as the receiver/transferee's Reserve Bank communicates to the receiver/transferee of the credit. This is so since a FedWire payment is guaranteed by the Reserve System. Inasmuch as receipt by the receiver/transferee coincides with credit given to it by the Reserve Bank, "issue" is defined by reference to such credit and not the actual receipt (as it is the usual rule under s. 4A-103(1)(e)).

4A-103(1)(i) to cover all systems “under which a transfer order by a bank addressed to another bank is transmitted . . . for transmission to the bank to which the order is addressed”. The Comment stresses that this definition is broad enough to cover communication and settlement systems like FedWire and CHIPS, communication systems like SWIFT,⁷⁴ as well as automated clearing houses processing and transmitting interbank transfer orders.⁷⁵

The concluding general provision is s. 4A-105 allowing variation of the effect of the provisions of Article 4A “by the agreement of the affected party”. Furthermore, a “wire transfer system rule”, broadly defined to mean a Federal Reserve regulation or operating letter as well as “a rule of a wire transfer system that governs conduct or defines rights or liabilities of the banks using the wire system”, “may be effective even if it conflicts with a provision of . . . Article [4A]”, so as to vary rights and obligations of a party to a payment transaction, “whether or not the affected party assents to the rule”. The Comment softens the impact of such wire transfer rules, by explaining, in effect, that by their own terms provisions relating to the basic structure of Article 4A and basic rights thereunder⁷⁶ may not be superseded by wire transfer system rules.⁷⁷

⁷⁴ For the distinction between a mere communication wire system and a communication and settlement system, see Scott, *supra*, footnote 10, at p. 1669.

⁷⁵ See Comment 4 to s. 4A-103.

⁷⁶ Such provisions, which are neither cited nor referred to in the Comment, are s. 4A-203(5) and 204(5) (rights of a non-bank customer re: authorization of transfer orders “may be varied only by the agreement of the customer”); 4A-205(4) (a wire transfer system rule cannot vary the time when acceptance of a transfer order occurs); 4A-206(7) (a wire transfer system rule may not usually vary the effect of a provision dealing with revocation or amendment of transfer order); 4A-207(7) (a wire transfer system rule may not conflict with provisions dealing with allocation of transmittal error losses); 4A-208(4) (a wire transfer system rule may not conflict with provisions dealing with effect of legal process and setoff); 4A-303(6) (neither a wire transfer system rule nor an agreement can be in conflict with subsections providing payment obligations of destination bank to beneficiary); 4A-304(3) (neither a wire transfer system rule nor an agreement may conflict with a section providing for the transmitting bank’s obligations created by acceptance of a transfer order); 4A-307(4) (only “an agreement by the parties” may vary the measure of recovery by a sending customer or a beneficiary under a section providing for measure of damages of breach of obligations under Article 4A); and 4A-308(3) (only an agreement between the sending customer and the beneficiary may vary their respective rights under a section providing for payment and discharge).

⁷⁷ This is a substantive deviation from a Previous Draft. Thereunder, in clear rejection of UCC 4-103(2), and subject only to a possible Federal pre-emption by Federal Reserve regulations, agreements varying the effect of Article 4A could bind only banks which are parties to them, and not affect non-consenting customers.

Part 2: Issue and Acceptance of Transfer Orders

(1) Additional Definitions

The first two sections of Part 2 add a few new definitions.

Section 4A-201(1) defines “wire transfer business day” of a receiver as that part of the day during which it is open for the receipt, processing and transmittal of transfer orders. According to Comment 1, the definition is premised on the fact that wire transfer business is frequently transacted outside of general banking hours, so that the definition of “banking day” in UCC 4-104(1)(c) is inappropriate.⁷⁸ The definition designates as “wire transfer business day” that part of the day wherein *all* functions of the receiver, that is receipt, processing *and* transmittal, and not only part of them, can be performed.⁷⁹

Section 4A-201(2) governs the time when a transfer order is “received”. It does so by stating that this time is determined according to general rules, that is, “by the rules applicable to receipt of a notice stated in subsection (27) of Section 1-201”.⁸⁰ The provision goes on to accommodate cut-off times fixed by receivers, whether uniform or applicable to different senders or categories of senders, for the handling of transfer orders received on that day. A transfer order received after such a cut-off point, “may be treated by the receiver as received at the opening of the next wire transfer day.” This is based on UCC 4-107.⁸¹

Section 4A-202 defines “value date” and “execution date”. “Value date” refers to the day the destination bank is to pay the beneficiary. “Execution date” refers to the day on which the transmitting bank is to issue a transfer order.⁸² In both cases, it is the

⁷⁸ “Banking day” is defined in UCC 4-104(1)(c) as “that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions”.

⁷⁹ *Ibid.*

⁸⁰ UCC 1-201(27) provides that:

Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. ...

The provision goes on to elaborate on the “due diligence” requirement.

⁸¹ And not on UCC 4-203, as stated in Comment 2 to s. 4A-201. Under UCC 4-107, “a bank may fix an afternoon hour of 2 P.M. or later as a cut-off hour for the handling of money and items and the making of entries on its books . . . Any item or deposit of money received on any day after a cut-off hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.”

⁸² For “execution” as an act of the receiver, and “issue”, see s. 4A-103(1)(d) and (e).

day of issue, unless a later date is specified in the transfer order. A transfer order issued to a transmitting bank does not have to state a value date. However, where it states a value date later than the date of its issue, without stating an execution date, "the execution date is any date that reasonably assures receipt by the destination bank of a transfer order complying with the sender's transfer order (i) on the value date, or (ii) in the case of an order payable in a foreign currency, two days before the value date." Where a date determined under these rules is not "a wire transfer business day",⁸³ the date is postponed to the next day on which a wire transfer business day of the receiver bank falls.

Under subsec. (3), early or late execution or payment are effective, though their consequences are determined "in other provisions of ... Article [4A]".

(2) Unauthorized Transfer Orders

Section 4A-203 deals with the customer's liability, presumably to reimburse its own bank or "receiver", for a payment, made either without, or after, the receiver's compliance with a "verification procedure".⁸⁴ A very large percentage of transfer orders are transmitted electronically and the provision reflects the fact that under those circumstances it is standard practice to use verification procedures to assure that a transfer order is authorized.⁸⁵ The provision is premised on the fact that normally, the use of the agreed verification procedure by the receiver will indicate authorization so as to make the non-bank sending customer liable for the amount of the order. It then goes on to provide for the case where no verification procedure was followed, as well as for the case where even though the agreed upon procedure was followed the transfer order had not been authorized.

Thus, under s. 4A-203(2), the customer is liable to pay the amount of a transfer order, even though the receiver accepted it without complying with a verification procedure, provided that

⁸³ As defined in s. 4A-201(1). See, *supra*, text around footnote 78.

⁸⁴ "Verification procedure" is defined in s. 4A-203(1) as:

... a procedure agreed to by a receiver and a customer providing for verification of transfer orders to the receiver that purport to be those of the customer by the use in the transmission of those orders of algorithms or other codes or identifying words or numbers, encryption, callback procedures or other security devices or procedures. Comparison of a signature on a transfer order with an authorized signature on a signature card is not by itself a verification procedure.

⁸⁵ See Comment 1.

“the order is authorized by the customer, or the customer is otherwise bound pursuant to the law of agency or other applicable law”. Stated otherwise, use of the verification procedure is helpful for a receiver wishing to be covered by its customer. Nevertheless, liability is to be fastened on the customer even where no such procedure has been followed, wherever general principles of law impose liability. Presumably such general principles may relate to actual authority, either express or implied, apparent authority, as well as estoppel.

According to Comment 1, subsec. (2) applies to the case where no verification procedure is in effect as well as to the case where the receiver does not comply with the agreed-upon procedure. The provision is thus premised on the broad principle that no person is liable on a transfer order unless such person authorized it.⁸⁶

Subsection (2) further provides for a presumption “that the customer is obliged to pay a transfer order accepted by the receiver that purports to be the order of the customer”. The presumption may be rebutted by the customer’s “substantial evidence”, in which case the burden of proving the customer’s liability is allocated to the receiver.

Subsection (3) deals with an unauthorized payment made after the receiver’s compliance with the verification procedure. To escape liability under these circumstances, the customer must prove either that the unauthorized transfer order was initiated by “a person with access to confidential information obtained from the receiver”, or that the verification procedure “is not a commercially reasonable method of providing security against unauthorized transfer orders, [and] acceptance of the transfer order might reasonably have been prevented if a commercially reasonable verification procedure had been in effect.”⁸⁷ Stated otherwise, wrongdoings of a receiver’s insiders as well as the quality of the pertaining verification procedures are within the responsibility of the receiver institution. In any event, it should be stressed that for the non-bank sending customer to escape liability under subsec. (3), the transfer order must be “unauthorized”, broadly defined in relation to “the law of agency and other applicable law”.⁸⁸ It is

⁸⁶ UCC Article 3 states this principle, as applied to commercial paper, in a more positive way. Thus, under UCC 3-401(1), “No person is liable on an instrument unless his signature appears thereon.”

⁸⁷ Both phrases are broadly defined and explained in subsec. (4).

⁸⁸ See also the discussion in the previous paragraph, relating to subsec. (2).

unclear whether a transfer order, initiated by its own insider, as opposed to either a receiver's insider or a stranger, can ever render the non-bank sending customer not liable under s. 4A-203(3).

No provision in Article 4A fastens upon a customer and its bank corresponding general duties of care designed to prevent losses occurring due to unauthorized or materially altered transfer orders.⁸⁹ Arguably, the existence of such duties is to be determined under general principles of law.⁹⁰

However, s. 4A-204 provides for corresponding duties of care in one situation. It requires a non-bank customer to report any unauthorized transfer order. Under subsec. (2), the duty is triggered by the receipt by the customer from the receiver of "a statement describing the customer's purported order".⁹¹ A customer is required to examine the statement and notify the receiver "of a lack of authority within a reasonable time". "Reasonable time" is defined as a period within either 15 days after receiving the statement, or any other "not manifestly unreasonable" period, as fixed by agreement. Upon the failure to perform that duty, under subsec. (3),

the customer is liable to the receiver for loss resulting from that failure with respect to the order to which the duty applies and any subsequent unauthorized transfer order initiated by the same person, if the subsequent order is accepted in good faith by the receiver before receiving notification that the order to which the duty applies was not an authorized order of the customer.

As Comment 3 explains, it is unlikely that a customer's prompt notification could be made prior to actual payment to the beneficiary. Hence, the customer's liability actually relates to future transfer orders that would not have been carried out had the first one been discovered and reported in a timely manner.

Subsection (3) goes on to allow for the reduction, up to the

⁸⁹ This is unlike UCC 3-406, which, in connection with commercial paper, provides that:

[a]ny person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

⁹⁰ Cf. *Bradford Trust Co. v. Texas American Bank*, 790 F.2d 407 (5th Cir., 1986), recognizing the originating bank's duty of care to the sending customer.

⁹¹ "'Statement' means a writing or an electronic message that can be viewed and the contents of which are preserved in a record." (s. 4A-204(2)).

elimination altogether, of the customer's liability thereunder, depending on the existence and amount of the receiver's own negligence, as proved by the customer, in not preventing the loss.

Finally, subsec. (4) provides for a limitation period,⁹² running from the receipt of the statement describing the unauthorized transfer order, at the conclusion of which the customer is precluded from trying to escape liability for the entire amount of the transfer order, "regardless of fault or lack of fault by either the customer or the receiver". This appears to apply to each unauthorized transfer order separately, as of the original one.

In general, s. 4A-204 is modelled on UCC 4-406, dealing with a customer's duty to report unauthorized cheques. None the less, unlike cheque payments, the wire transfer typically involves a verification procedure designed to confirm its authenticity.⁹³ Hence, s. 4A-204 is of limited application.⁹⁴ Under subsec. (1), it applies only "if (i) a receiver in good faith accepts a transfer order that purports to be the order of a customer, and (ii) *the customer is not liable to pay the order under subsection (2) or (3) of Section 4A-203*" (emphasis added). According to Comment 2, the typical cases to which the provision applies are those in which the receiver is relying on a spurious telephone call, letter, telex or other written communication, purporting to be the customer's transfer order. In general, the provision "applies only to cases in which no commercially reasonable verification procedure is in effect, to cases in which the receiver did not comply with a commercially reasonable verification procedure that was in effect, or to cases in which the customer avoids liability" by proving that the spurious transfer order was initiated by an insider with the receiver.⁹⁵ Compliance with a commercially reasonable verification procedure will protect the receiver, except for the case of an unauthorized transfer order initiated at its own end,⁹⁶ without the need to invoke s. 4A-204.

Anglo-Canadian law has not recognized the existence of a non-statutory duty on the part of a bank customer to detect and prevent cheque forgeries,⁹⁷ unless provided for by contract.⁹⁸ It is

⁹² Whose length is not specified in the section. A Previous Draft prescribed a one-year limitation period.

⁹³ See discussion on s. 4A-203, *supra*, text around footnotes 84 to 88.

⁹⁴ See Comment 1 to s. 4A-204.

⁹⁵ Comment 2. To this one may add the unlikely case of payment, notwithstanding compliance with a verification procedure that failed to authorize the transfer. Of course, particularly in such a case (but in fact in all instances enumerated in the Comment), the bank may lose due to its own negligence (s. 4A-204(3)).

⁹⁶ Under s. 4A-203(3)(a), discussed, *supra*, in text around footnote 87.

⁹⁷ See *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.*, [1985] 3 W.L.R. 317 (P.C.);

thus unlikely that a comparable duty of care will be fastened by courts in Canada on a bank customer in connection with wire transfers.

(3) Acceptance and Rejection

Acceptance and rejection of transfer orders are dealt with in s. 4A-205. According to the Comment,⁹⁹ the sender's transfer order is treated in that provision as a request made by the sender to the receiver to execute or pay the order. The receiver may either accept or reject this request. Acceptance and rejection are mutually exclusive opposites. In general, prompt action by the receiver, responding to the sender's request, is expected. Acceptance of the transfer order creates a contract and imposes obligations on the receiver. These obligations are governed by ss. 4A-303 and 304.¹⁰⁰ They run either in the sender's favour, where the receiver is a transmitting bank, or in favour of the beneficiary, if the receiver is the destination bank.

Under s. 4A-205(1), a transfer order is accepted by the receiver at the earliest of the following four times:

- (a) When the receiver, which is a transmitting bank, executes the order. Under s. 4A-103(1)(d), such "execution" occurs when the receiver "issues a transfer order intended to carry out the sender's transfer order".
- (b) When the receiver, which is the destination bank, "notifies the beneficiary of (i) receipt of the order or (ii) credit to the account of the beneficiary with respect to the order, unless the notice indicates that the destination bank is rejecting the order or that payment of, or release of funds with respect to, the order by the destination bank will not be made until receipt of settlement from the sender of the order."
- (c) Where the sender is a bank, the receiver is the destination bank, and the order provides for payment to an account with the destination bank, "at the time the sender pays its

and *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 40 D.L.R. (4th) 385.

⁹⁸ *Arrow Transfer Co. Ltd. v. Royal Bank of Canada*, [1972] S.C.R. 845, 27 D.L.R. (3d) 81, implied such a duty from a standard verification clause in the account agreement. English courts require the duty to be expressly provided for in the bank-customer agreement. See *Tai Hing Cotton Mill*, *supra*, footnote 97.

⁹⁹ See, in general, Comments 1 and 9.

¹⁰⁰ Discussed, *infra*, in Part 3(1).

obligation stated in subsection (2) of Section 4A-302". The latter provides that the sender's obligation to pay to the receiver the amount of the order arises upon the acceptance of the transfer order.

At first blush, (c) seems to be circular: acceptance by the receiver occurs under s. 4A-205(1)(c) upon the sender's payment made according to an obligation arising under s. 4A-302(2), upon the receiver's acceptance. Nevertheless, subsec. (1)(c) is apparently designed to encompass those situations where payment by the sending transmitting bank to the destination bank, far from fulfilling an obligation arising from the receiver's acceptance, in fact generates the receiver's acceptance. Indeed, according to Comment 4 to s. 4A-205, subsec. (1)(c) covers a FedWire transfer of funds as well as a mistaken payment by the destination bank to the wrong beneficiary. In the former case, that of a FedWire transfer of funds, under s. 4A-302(3), the sender pays the receiver as soon as the receiver obtains FedWire settlement.¹⁰¹ Under FedWire Rules,¹⁰² FedWire settlement is marked by the receiver obtaining final credit to its account with its Federal Reserve Bank.¹⁰³ Under s. 4A-103(2), such final credit is tantamount to the issuance of the transfer order.¹⁰⁴ "Thus, acceptance occurs when the FedWire is issued",¹⁰⁵ that is, before the beneficiary is notified so as to bring upon acceptance under para. (b).

In the latter case, that of a mistaken payment by the destination bank to the wrong beneficiary, the true beneficiary is never notified so as to generate acceptance under para. (b). Therefore, the effect of s. 4A-302(3) is that the interbank settlement, usually forthcoming at the end of the day, will result in payment under s. 4A-302(2),¹⁰⁶ so as to generate acceptance under s. 4A-205(1)(c). In short, the underlying rationale of para. (c) is that a receiver may not reject a transfer order for which it has been paid. Accordingly, payment by the sender triggers acceptance by the receiver.

The combined effect of paras. (b) and (c) is that in any transfer other than a "book transfer",¹⁰⁷ acceptance by the destination

¹⁰¹ Section 4A-302 is discussed, *infra*, in Part 3(3).

¹⁰² See, *supra*, footnote 72.

¹⁰³ This is explained in Comment 4 to s. 4A-205. See Geva, *supra*, footnote 71, at p. 428.

¹⁰⁴ See, *supra*, text and footnote 73.

¹⁰⁵ Comment 4 to s. 4A-205.

¹⁰⁶ In fact, subject to subsec. (2) discussed below, any inaction will result in midnight acceptance under para. (d).

¹⁰⁷ That is, payment by a "sending customer" to a "beneficiary" maintaining accounts with the same bank. See, *supra*, text around footnote 69.

bank occurs either by its notification to the beneficiary or by its receipt of payment from the sending transmitting bank. The sender's payment will precede the notification to the beneficiary in FedWire and in the case of a mistaken payment to the wrong beneficiary, as well as whenever the destination bank chooses to delay notification or its effect, and thereby payment, to that point.¹⁰⁸ None the less, the destination bank's power to delay acceptance by withholding notification may be of short duration. Large-dollar wire systems in the U.S. normally provide for same-day settlement.¹⁰⁹ Hence, the sender's payment is likely to be forthcoming on the day of the receipt of the transfer order by the destination bank.

The fourth milestone¹¹⁰ for the occurrence of acceptance under s. 4A-205(1) is

- (d) At midnight of either the execution or value date of the order,¹¹¹ depending on whether the receiver is a transmitting bank or the destination bank. But no acceptance is to take place under subsec. (1)(d) unless the receiver has been paid or has access to funds that can provide payment.

This paragraph reverses the rule of *Houston Contracting Co. v. Chase Manhattan Bank*.¹¹² This case held that the receiver's failure to respond to a transfer order by midnight of the day of its issuance was not tantamount to an acceptance.¹¹³ It did not charge the receiver with liability whatsoever.

Since an interbank settlement will usually be accomplished before midnight, subsec. (1)(d) will normally apply only to a receiver which is a transmitting bank and not a destination bank. The only case in which subsec. (1)(d) applies to the destination bank is that in which the sender is a sending customer, *i.e.*, a book transfer.¹¹⁴ Subsection (2) adds two qualifications to the scope of subsec. (1)(d):

¹⁰⁸ "Acceptance" by the destination bank marks its "payment" obligation to the beneficiary. See s. 4A-303(2), discussed, *infra*, in Part 3(1).

¹⁰⁹ See, in general, B. Geva, "Daylight Overdrafts and Settlement Failure — Credit Risk Controls in U.S. Wire Systems" (1987), 3 Bank L. Bull. (Aust.) 33.

¹¹⁰ See, *supra*, paragraph which follows the one containing footnote 100.

¹¹¹ See respective definitions in s. 4A-202, discussed, *supra*, in Part 2(1).

¹¹² 539 F. Supp. 247 (S.D.N.Y., 1985).

¹¹³ The court held that UCC 4-302(a), requiring a bank to respond to the presentment of "an item" by "midnight deadline" at a penalty of being "accountable" for its amount upon its failure to do so, did not apply to wire transfers. "Midnight deadline" is defined in UCC 4-104(1)(h) as the midnight on the next banking day following the banking day of the receipt of an item.

¹¹⁴ Comment 5 to s. 4A-205.

[i] No acceptance occurs under subsection (1)(d) if the sender is not reasonably identified in the order or has no contract or course of dealing with the receiver that would reasonably cause the sender to expect that the receiver would execute or pay the order. [ii] If a transfer order has not been accepted by midnight of the execution date or value date of the order, acceptance cannot occur thereafter under subsection (1)(d).

In short, subsec. (1)(d) does not apply to an out-of-ordinary-course transfer order, as well as where funds are made available to the receiver after the midnight deadline. Where the receiver is instructed to execute or pay the order at a future date, subsec. (1)(d) applies to that future date.¹¹⁵

Under subsec. (3), rejection is to be accomplished "by giving notice of rejection to the sender". Rejection is effective either "when notice is given if given by any means that is commercially reasonable", or "[i]n any other case ... when notice is received by the sender". No comprehensive test for commercial reasonableness is provided, but it is stated, as a general rule of thumb, that notice of rejection given by the same means used by the sender in transmitting the transfer order is commercially reasonable. Comment 8 gives the following example: a sender using first class mail cannot reasonably expect the receiver to use a more expensive means such as telex or telephone. Subsection 3 further provides that suspension of payments by a receiver is tantamount to automatic and immediate rejection, which does not require notice to be given. In general, acceptance and rejection are opposites that are mutually exclusive:¹¹⁶ "Rejection precludes a subsequent acceptance and acceptance precludes a subsequent rejection."¹¹⁷

In summary, a receiver is expected to respond promptly to a transfer order, at least by rejecting it. Normally both acceptance and rejection requires action. Inaction may result in midnight acceptance under subsec. (1)(d), usually by a transmitting bank, but not under all circumstances. Upon receiving settlement, usually shortly after the closing of the business day, a non-rejecting destination bank may find out that by its inaction it has in fact accepted the transfer order.

¹¹⁵ Comments 6 and 7, *ibid.*

¹¹⁶ Comment 9, *ibid.*

¹¹⁷ Subsection (3).

(4) Revocation, Amendment and Transmittal Errors

The revocation and amendment of transfer orders is governed by s. 4A-206. In principle, revocation or amendment can be either both effective and rightful, or ineffective altogether. There is no intermediate concept of wrongful revocation or amendment.¹¹⁸

The general rule is provided for in subsec. (1). The sender may revoke or amend a transfer order unilaterally, by a communication to the receiver. The communication may be oral, written or electronic. It must be received "at a time and in a manner affording the receiver a reasonable opportunity to act on it (i) before execution of the order if the receiver is a transmitting bank, or (ii) acceptance of the order if the receiver is the destination bank." Stated otherwise, a wire transfer cannot be used as a deferred payment machinery.¹¹⁹ While it may state an execution date which is later than the day it is issued,¹²⁰ until its execution it can be revoked unilaterally.

In identifying either "execution" or "acceptance", depending on whether the receiver is a transmitting bank or the destination bank, as the cutoff point for the unilateral revocation or amendment, Article 4A introduces certainty to a quite unsettled area of the law of wire transfers.¹²¹ Revocability is thus determined by a clear and well defined act of the immediate receiver and not by vague tests relating to a receiver's internal process. Nor is revocability lost to the sender too soon, that is, upon the mere receipt of the transfer order by the immediate receiver.

Subsection (1) of s. 4A-206 is modelled on UCC 4-403 providing for a customer's right to stop payment of "any item payable for his account", including his cheques.¹²² There is however no provision in Article 4A, corresponding to that of UCC 4-407, dealing with the parties' respective positions upon the receiver's wrongful payment, that is upon its failure to comply with an effective revocation or amendment of a transfer order.¹²³ Perhaps subsec.

¹¹⁸ See Comment 1 to s. 4A-206.

¹¹⁹ Cf. E.P. Ellinger, "Electronic Funds Transfer as a Deferred Settlement System", in R.M. Goode, ed., *Electronic Banking: The Legal Implications* (London, Institute of Bankers, and Centre for Commercial Law Studies of Queen Mary College, 1985), p. 29.

¹²⁰ Cf. s. 4A-201(1), discussed, *supra*, in Part 2(1).

¹²¹ For the confusion re: "finality of payment" see, *supra*, Introduction (2).

¹²² Cf. Bills of Exchange Act, R.S.C. 1970, c. B-5, as amended, s. 167(a).

¹²³ In such a case, "to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item", the paying bank is subrogated to the position of a holder in due course, the payee on the transaction, and the

(4), providing for the retroactive effect of any revocation or amendment, may suggest that the improper act is null and void so as to require a complete restoration of the status quo. At the same time, so far as certainty is concerned, the current state of the common law governing the recovery of mistaken bank payments may not be promising.¹²⁴

After the execution of the order, the revocation or amendment of a transfer order given to a transmitting bank can be made in limited circumstances. It can be made by the sender, under subsec. (2), only "if the receiver agrees or a wire transfer system rule allows revocation or amendment without agreement of the receiver". In any event, in such a case, "no revocation or amendment is possible unless all transfer orders issued by subsequent transmitting banks to carry out the order to be revoked or amended are also revoked or amended to comply." Similarly, under subsec. (3), after acceptance, where the receiver is the destination bank, the transfer order can be revoked or amended by the sender but only with the consent of the receiver or under a wire transfer system rule dispensing with such consent.

Even so, revocation or amendment of a transfer order that has been accepted by the destination bank can be made "only if necessary to correct a mistake by the sender, or by a previous sender in the payment transaction, which resulted or would result in payment to a beneficiary that is not entitled to retain the entire payment under the law governing mistake and restitution". Revocation (but not amendment) made by the destination bank under such circumstances either discharges the destination bank from its obligation to pay the beneficiary, or, where payment has already been made, entitles this bank to recover from the beneficiary any amount to which the beneficiary is not entitled, under the law governing mistake and restitution. Obviously, under these circumstances, both discharge and right to recover presuppose that payment would have been mistaken, that is, that the beneficiary is in fact not entitled to receive it from the sending customer. Where this assumption turns out to be erroneous and the beneficiary is held to be entitled to payment, the receiving bank is

drawer. In short, as against any plaintiff, the bank may assert defences based on that plaintiff's benefit derived from the payment.

¹²⁴ For a recent exposition of this law see M.H. Ogilvie, "Recovery of Money Paid Under Mistake of Fact: When the Bank Loses" (1987), 1 B.F.L.R. 413.

exposed to substantial risks for consenting to the revocation or amendment of the transfer order.

Indeed, a receiving bank is under no obligation to consent to revocation or amendment under subsecs. (2) and (3).¹²⁵ However, under subsec. (4), where the receiver either consents or is bound by a wire transfer system rule and where the revocation or amendment is not effective, the sender is made liable to the receiving bank for any loss or expenses.^{125a} Subsection (4) applies to a receiver which is either a transmitting bank or destination bank.

Subsection (4) further provides for the retroactive effect of revocation or amendment. Subsection (5) provides, in line with UCC 4-405(1), that neither death nor legal incapacity of the sender by itself revokes a transfer order. This is true unless the incapacitating event comes to the receiver's attention in circumstances allowing it "reasonable opportunity to act on it" prior to acceptance (by a receiver which is the destination bank) or execution (by a receiver which is a transmitting bank).¹²⁶

Subsection (6) of s. 4A-206 may be described, by analogy to a corresponding concept from letter of credit law, as providing for the autonomy of the payment obligation of the destination bank. The provision does not allow a court to enjoin a destination bank from releasing funds to the beneficiary.¹²⁷ The prohibition is not stated to be limited to the post acceptance stage. Presumably, no injunction can be issued even prior to acceptance. Two specific exceptions are enumerated: (i) a mistaken payment as provided for in subsec. (3), and (ii) where "the payment was ordered as the result of fraud." The former is designed to reinforce the policy against the completion of a mistaken payment, as reflected in subsec. (3), in circumstances where the destination bank is either unwilling to incur the risk associated with consenting to the sender's revocation or amendment or is not bound to incur such a risk by a wire transfer system rule. The latter is reminiscent of the

¹²⁵ See also Comment 3 to s. 4A-206.

^{125a} Compensable "loss or expenses" include "reasonable attorney's fees and expenses of litigation incurred by the receiver as a result of the attempted revocation or amendment". *Ibid.*

¹²⁶ Cf. Bills of Exchange Act, s. 167(b).

¹²⁷ Nevertheless, "the destination bank incurs no liability for failure to release funds to the beneficiary while enjoined from doing so even if the injunction is issued in violation of this subsection." See s. 4A-206(6).

fraud exception to the autonomy of the letter of credit. Unfortunately, it carries with it the same uncertainty of scope. For example, it is unclear whether the fraud must be on the originating bank,¹²⁸ or on the beneficiary.

According to Comment 4, the effect of the injunction is to suspend the destination bank's obligation to pay the beneficiary. Due to the speed with which wire transfers are normally carried out, the view expressed in the Comment is that "it is not likely that there will be many cases in which a sender would be successful in obtaining injunctive relief which was timely."

Section 4A-207 governs risk allocation where an error occurs in the course of transmitting a transfer order which has not been effectively revoked or enjoined under s. 4A-206.

Under s. 4A-207(1), the risk of transmitting a transfer order by means of a wire transfer system or other communication system, including a telegraph company as well as a processing centre,¹²⁹ usually falls on the immediate sender. Where the terms of the transfer order received by the receiver from such a system differ from the original terms of the transfer order as communicated by the sender to the system, the sender's responsibilities are usually determined by the terms of the transfer order received by the receiver. Thus, upon the occurrence of such a transformation in the content of the transfer order, "the sender issues a transfer order to the receiver when the receiver receives the order transmitted by the wire transfer or communication system, and the terms of the sender's order are those of the order received by the receiver." Except that "if the discrepancy could have been detected by proper utilization by the receiver of error-detection procedures in force, the terms of the sender's order are those transmitted by the sender to the wire transfer or communication system." The provision applies whenever a transfer order is communicated to the receiver by means of an intermediary, and is not issued by a sender to a receiver directly by delivery of a writing or electronic device or by an oral or electronic communication.¹³⁰ Where the risk falls on the sender, its remedy against the intermediary wire or communication system is not provided for in Article 4A.¹³¹ The respective positions of the sending customer, the

¹²⁸ An undefined term, denoting the first transmitting bank, that is, the sending customer's bank. See, *supra*, text and footnote 68.

¹²⁹ See Comment 1 to s. 4A-207.

¹³⁰ *Ibid.*

¹³¹ According to Comment 1, *ibid.*, the remedy "will depend upon the contract between the sender and the telegraph company."

beneficiary, any transmitting bank, and the destination bank, are governed by subsecs. (2) to (6) of s. 4A-207. These provisions cover errors occurring in the course of the transmittal of transfer orders carrying out a payment transaction. They apply irrespective of whether the pertaining transfer order was communicated directly to a receiver or *via* an intermediary wire or communication system. As well, they apply regardless of the place where the error occurs, that is, whether at a bank or an intermediary wire or communication system. In short, subsecs. (2) to (6) apply to a broader range of circumstances than those governed by subsec. (1).

Subsection (2) deals with the situation where “a transmitting bank executes the transfer order of a sender (i) by issuing duplicate transfer orders, or (ii) by issuing a transfer order in an amount greater than the amount of the sender’s order, and (iii) the error causes the destination bank . . . to accept a transfer order or orders in an amount greater than the amount of the transfer order of the sender.” This situation generates three results:

- (i) Payment by the sending customer to the beneficiary is limited to the original amount, as specified in the sending customer’s transfer order.
- (ii) The erring transmitting bank “may recover the excess payment from the beneficiary to the extent that the law governing mistake and restitution allows recovery”.¹³²
- (iii) The erring transmitting bank is liable to pay the transfer order/s issued by it but is entitled to receive payment from the sender in the amount of the sender’s order.

The initial risk thus falls on the erring transmitting bank. It is not entitled to recover the excess from a previous party and, at the same time, is liable to any subsequent bank for the amount of its own transfer order. While it is true that the erring transmitting bank has the right to recover the excess from the beneficiary, the beneficiary is not its own customer, and may be located far away. Furthermore, defences available to the beneficiary under the law governing mistake and restitution may arise from its relationship with its immediate payor, that is, the destination bank, so as to be beyond the control of the erring transmitting bank.¹³³

¹³² Stated otherwise, the transmitting bank’s right is not absolute. It is subject to the defences that the beneficiary may raise under the law governing mistake and restitution.

¹³³ A similar result to that of subsec. (2) was reached at common law in *Walker v. Texas*

Subsection (3) of s. 4A-207 deals with the situation where "a transmitting bank executes the transfer order of a sender (i) by issuing a transfer order in an amount less than the amount of the sender's order, and (ii) the error of the transmitting bank causes the destination bank ... to accept a transfer order in the amount of the transfer order of the transmitting bank." In such a case, payment by the destination bank to the beneficiary has been carried out in the smaller amount. The immediate sender's liability and that of each previous sender is then limited to the smaller amount. So far as Article 4A is concerned, the only balance to be restored is that relating to a previous sender which paid the full original amount of a transfer order accepted by it prior to the error: "A previous sender that has overpaid is entitled to recover the overpayment from the receiver that accepted the sender's transfer order." Under these circumstances, recovery is from a bank, and perhaps for that reason it is not made subject to the law governing mistake and restitution.¹³⁴

When the beneficiary of the transfer order of a transmitting bank accepted by the destination bank is different from the beneficiary of the transfer order of the sending customer, the situation is governed by subsec. (4). In such a case, "no payment to the beneficiary of the order of the transmitting bank is made by the sending customer." The transmitting bank may recover the ultimate beneficiary "to the extent that the law governing mistake and restitution allows recovery".¹³⁵

Subsection (5) of s. 4A-207 governs the situation of a transfer order issued to the destination bank, in which either (i) the named beneficiary, bank account number or other identification of the beneficiary refers to a non-existing person or account, or (ii) the name of the beneficiary does not correspond to the account number so that both "identify different persons". In such cases, "no person, except the beneficiary intended by the sending customer ... has rights as a beneficiary of the order." Where "no person has rights as a beneficiary", that is, where the beneficiary on the received transfer order is non-existent, "acceptance of the order is not possible". Upon paying "a person that has no rights as

Commerce Bank, 635 F. Supp. 678 (S.D. Tex., 1986). The case also demonstrates that the originating bank's recovery rights against the beneficiary may be worthless. After it had been paid, the beneficiary in that case became insolvent.

¹³⁴ See also, *supra*, footnote 132 and text around it.

¹³⁵ See, *supra*, footnote 132.

a beneficiary", the destination bank is entitled to recover from that person the amount paid, "to the extent that the law governing mistake and restitution allows recovery".¹³⁶

The provision allocates the risk of such a wrongful payment to the destination bank. Though the error may have been committed by the sending customer, the risk does not fall on that party, but on that bank situated in the best position to discover the error. As explained by Comment 5,

If its order, because of an internal inconsistency, does not allow the beneficiary to be identified by the destination bank, Sending Customer can reasonably expect that the order will be rejected . . . By specifically identifying the person whose account is to be credited Sending Customer can protect itself. By executing a transfer order in which the beneficiary is described by both a name and an account number, the destination bank assumes the burden of ascertaining that the person paid fits the description.

Subsection (5) appears to codify the result of *Securities Fund Services, Inc. v. American National Bank & Trust Co.*¹³⁷ In that case, the sending customer was fraudulently induced by a third party to issue a transfer order designating a beneficiary and account number that did not match. The destination bank credited the designated account, thereby implementing the third party's fraudulent scheme. The court held for the sending customer, and allocated the loss to the destination bank on the grounds of an implied duty of care owed by the destination bank to the sending customer under an implied agency relationship. It seems however that when the transfer order issued to the originating bank is altogether unauthorized, as distinguished from one procured by fraud, s. 4A-207(5) is superseded by s. 4A-203 dealing with unauthorized transfer orders.¹³⁸

A sending customer choosing a wire payment premised on speedy automated processing may lose the protection afforded to it by subsec. (5). Thus, subsec. (5) is explicitly stated to be superseded by subsec. (6). The latter applies to a transfer order issued to a destination bank that is transmitted "by use of a standard machine-readable format to facilitate the automated processing of

¹³⁶ Compare with footnote 132.

¹³⁷ 542 F. Supp. 323 (N.D. Ill., 1982).

¹³⁸ Discussed, *supra*, in Part 2(2). Again, this apparently codifies the common law position. Cf. *Bradford Trust Co. v. Texas American Bank*, 790 F. 2d 407 (5th Cir., 1986), where the destination bank escaped liability, as against the originating bank, for crediting an account number which did not match with the beneficiary's name, where the sending customer's transfer order was forged.

the order by the destination bank”, and that “identifies the beneficiary both by an identifying or bank account number and by name”. Subsection (6) then applies when “the name and number identify different persons” and the sender has notice “that payment will be made on the basis of the identifying or bank account number”.

Under those circumstances, where “the destination bank paid the person identified by the identifying or bank account number”, which was not the named beneficiary, notwithstanding subsec. (5), “[t]he beneficiary of the transfer order issued to the destination bank is the person identified by the identifying or bank account number”, and not the one identified by name. Therefore, if the transfer order is accepted by the destination bank, its sender is obliged to pay. It is entitled to be reimbursed by a previous sender communicating the erroneous information. But a previous sender that “did not have notice that payment would be made solely on the basis of that number” is specifically protected. The first liable sender may recover payment from the wrongful beneficiary, provided that under “the law governing mistake and restitution” that beneficiary is not entitled to retain the payment, and “to the extent that the law governing mistake and restitution allows recovery”.

At this juncture, several observations on the scope of s. 4A-207 are in order. First, subssecs. (2) to (6) do not cover errors generated either within the sending customer’s organization, or at an intermediary wire transfer or communication system employed by it to transmit the transfer order to the originating bank. Secondly, errors giving rise to situations falling under s. 4A-207 may be either committed in good faith or perpetuated fraudulently. Thirdly, an erroneous payment may affect the respective liabilities of the sending customer and beneficiary on their underlying contract. In general this aspect, as well as the possible recourse against a bank responsible for the error, is outside the scope of s. 4A-207.

(5) Creditor Process and the Transfer Order

Section 4A-208 deals with situations where a receiver is served with notice of creditor process, such as levy, attachment or garnishment,¹³⁹ with regard to either the sender’s or beneficiary’s

¹³⁹ Under subsec. (1), “creditor process” is used in s. 4A-208 to mean “levy, attachment,

account. The provision is further concerned with the destination bank's setoff right.

Subsection (2) deals with the situation in which the receiver is served with notice of creditor process relating to the sender's account. It is concerned with the receiver's right to charge the sender's account with respect to the sender's transfer order. Normally, the "receiver" and "sender" are likely to be the originating bank¹⁴⁰ and the "sending customer" respectively. In the typical case, there will not be sufficient funds in the sender's account to cover both the transfer order and the creditor process.

Subsection (2) thus provides that "the receiver may charge the account with respect to the transfer order, notwithstanding service of the creditor process, unless the service is made at a time and in a manner affording the receiver a reasonable opportunity to act on it before the receiver accepts the transfer order." Stated otherwise, a timely received notice of creditor process defeats the receiver's right to debit the sender's account with the amount of a transfer order that has not been accepted yet. Practically speaking, the respective transfer order may not be executed then.¹⁴¹

Subsection (2) deals neither with the originating bank's¹⁴² setoff right upon receiving the sending customer's transfer order, nor with the effect on that right, under those circumstances, of creditor process. However, according to Comment 3, other provisions of Article 4A allow the originating bank to decline to carry out its sending customer's transfer order and instead exercise its setoff right with respect to the balance at the sending customer's account. Comment 3 further explains that the effect of creditor process on the originating bank's setoff right is governed by state law which may provide that a creditor serving legal process takes subject to the bank's right of setoff.

Subsection (3) governs the destination bank's¹⁴³ right of setoff and creditor process served on it with respect to the beneficiary's account. It provides in para. (a), that until a transfer order is accepted by the destination bank, the amount credited to the

garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account".

¹⁴⁰ An undefined term, denoting the first transmitting bank, that is, the sending customer's bank. See Part 1, *supra*, text and footnote 68.

¹⁴¹ "Acceptance" by a transmitting bank is marked by "execution". See s. 4A-205(1)(a).

¹⁴² See, *supra*, footnote 140.

¹⁴³ The term is not explicitly mentioned in the subsection. But see Comment 4 to s. 4A-208.

beneficiary's account is not subject to the destination bank's setoff right as well as to the creditor process. No funds may be withdrawn by the beneficiary with respect to the transfer order, "if notice of creditor process is served [on the destination bank] at a time and in a manner affording [it] a reasonable opportunity to act on it before withdrawal of the credit". Whether the bank's setoff right comes ahead of the creditor process is not explicitly stated.¹⁴⁴

In some states, creditor process applies not only to existing debts but also to future debts, that is, also to debts of the destination bank to the beneficiary arising after service is made.¹⁴⁵ For such states, subsec. (3)(b) provides that having been served with notice of creditor process "at a time and in a manner affording [it] a reasonable opportunity to act on it", a receiver "may not rightfully reject [a] transfer order, except for an irregularity in [it]". The destination bank is not permitted to protect its customer by defeating the creditor process.¹⁴⁶

Part 3: Liabilities of Parties and Payment

(1) Acceptance

Under s. 4A-301, acceptance marks the point in time where the receiver incurs liability with respect to a transfer order.¹⁴⁷ An agreement, and occasionally provisions of Article 4A, may impose obligations on a receiver with respect to a transfer order, "but liability based on acceptance does not arise until acceptance occurs pursuant to Section 4A-205". The receiver's liability is exclusively contractual:¹⁴⁸ "A receiver is not the agent of the sender of the transfer order that it accepted, or of the beneficiary of the order, or of any previous sender in the payment transaction."¹⁴⁹

The sender's obligation created by the acceptance of a transfer order is governed by s. 4A-302. In general, the rules provided in that section are explicitly stated in subsec. (1) to be subject to the provisions of s. 4A-207, governing erroneous transfer orders,¹⁵⁰ of

¹⁴⁴ But see the last paragraph to Comment 5 in a Previous Draft: "The normal result under general state law is that a garnishment order is subject to a right of setoff by the bank."

¹⁴⁵ Comment 5 to s. 4A-208.

¹⁴⁶ *Ibid.*

¹⁴⁷ What constitutes "acceptance" is governed by s. 4A-205, discussed, *supra*, in Part 2(3).

¹⁴⁸ See Comment to s. 4A-301.

¹⁴⁹ Section 4A-301.

¹⁵⁰ These provisions are dealt with, *supra*, in Part 2(4).

s. 4A-307, governing the scope of liability under Article 4A,¹⁵¹ and those of s. 4A-309, dealing with the failure of a transmitting bank.¹⁵²

Acceptance by the receiver is not only a source of obligations and liabilities. It also generates rights. Thus, under s. 4A-302(2), upon the acceptance of a transfer order, the sender becomes obligated to the receiver "to pay the amount of the order", except that this obligation does not arise prior to either the execution date or value date, depending on whether the receiver is a transmitting bank or the destination bank.¹⁵³ The sender's obligation enures solely to the benefit of the receiver.¹⁵⁴

This may settle two common law controversies. First, the irrevocability of telex instructions received by a bank in the course of a wire transfer has never been established in English law.¹⁵⁵ In the United States, such irrevocability was judicially recognized but only in connection with transfer orders governed by specific wire transfer system rules.¹⁵⁶ Secondly, whether the sender's obligation enures also to the benefit of third parties besides the receiver, such as the beneficiary, has not been judicially resolved in the United States, where the transfer order has been regarded as effecting the assignment of funds to the beneficiary.¹⁵⁷ Both points have been settled by s. 4A-302(2): acceptance of the transfer note generates a binding obligation but only to the receiver.

The destination bank's obligation created by acceptance of a transfer order is governed by s. 4A-303.¹⁵⁸ Under subsec. (2), the accepting destination bank "is obligated to the beneficiary to pay the amount of the order". The precise timing of that obligation is made dependent under subsec. (4) on the manner of acceptance:¹⁵⁹

¹⁵¹ These provisions are dealt with, *infra*, in Part 3(2).

¹⁵² These provisions are dealt with, *infra*, in Part 3(4).

¹⁵³ For pertinent terminology, see s. 4A-202, discussed, *supra*, Part 2(1).

¹⁵⁴ See Comment 2 to s. 4A-302.

¹⁵⁵ See, e.g., *The Brimnes, Tenax Steamship Co. Ltd. v. The Brimnes (Owners)*, [1974] 3 All E.R. 88 (C.A.), at pp. 111-12, *per* Megaw L.J.

¹⁵⁶ *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2nd Cir., 1979), giving effect to the irrevocability of CHIPS transfers under CHIPS Rules.

¹⁵⁷ See, in general, Introduction (2), *supra*. A leading American authority supporting the assignment theory is *Delbrueck*, *supra*, footnote 156.

¹⁵⁸ Like s. 4A-302, s. 4A-303 is explicitly stated, in subsec. (1), to be subject to "Sections 4A-207, 4A-305 and 4A-309". Compare with text and footnotes 150 to 152, *supra*.

¹⁵⁹ See, *supra*, cross reference in footnote 147.

- (i) If acceptance occurred under s. 4A-205(1)(b), that is, by notification to the beneficiary of the receipt of the order, "payment is due on the day of acceptance", except that if the value date of the order is after the day acceptance occurs and the notice provides for payment on the value date, payment is due on the value date.
- (ii) If acceptance occurred under s. 4A-205(1)(c), that is, by means of the sender's payment to the receiver, "payment is due on the day of acceptance", except that if the receiver's acceptance occurred after the close of the receiver's wire transfer business day,¹⁶⁰ "payment is due on the receiver's next wire transfer business day".
- (iii) If acceptance occurred under s. 4A-205(1)(d), that is midnight of value date where the sender either paid or provided funds to the receiver, "payment is due on the destination bank's next wire transfer business day following the value date".

In connection with acceptance under s. 4A-205(1)(c) and (d), "the destination bank is required to give notice to the beneficiary of receipt of the transfer order before midnight of the day on which payment is due."

The obligations created by the acceptance of a transfer order by a transmitting bank are governed by s. 4A-304. The specific undertakings are provided in subsec. (1). Subsection (2) expands the list of those entitled to enforce some of subsec. (1) undertakings. Subsection (2) further expands such transmitting bank's undertakings with respect to the conduct of subsequent transmitting banks.

Subsection (1) fastens three undertakings upon a receiver which is a transmitting bank in connection with its acceptance of a transfer order:

- (a) The receiver warrants to the sender that the destination bank will accept a transfer order carrying out the sender's order.
- (b) Upon the execution of the sender's order by the receiver, the receiver warrants to the sender "that the time of execution of the sender's order and the terms of the transfer order issued by the receiver comply with the sender's order". This can be characterized as a warranty relating to the receiver's own compliance with the sender's instructions.

¹⁶⁰ See definition in s. 4A-201(1), discussed, *supra*, in Part 2(1).

- (c) Upon acceptance under s. 4A-205(1)(d), that is, by the passage of the midnight of the execution date, the receiver which either fails altogether to execute the order or delays its execution, becomes liable either for the failure to execute or the unexcused delay, as the case may be.¹⁶¹

Under subsec. (2), liability of every transmitting bank, whether or not it is the originating bank, is “for the benefit of the sending customer”. In turn, the sending customer may recover either directly from the breaching bank, or from “any intermediate transmitting bank”. Damages for conduct “in malicious disregard of the rights” of the sending customer, where applicable,¹⁶² may be recovered by the sending customer only from the breaching bank. In general, a transmitting bank that pays damages for breach by another transmitting bank is entitled to be reimbursed by the breaching bank.

The overall impact of s. 4A-304 is that, in general, a transmitting bank is responsible to a prior party as to the carrying out of the payment instructions by itself as well as by any subsequent party. Common law vicarious liability, and the prevailing American doctrine eliminating privity requirements, are codified and further bolstered, as liability may not be contracted out.¹⁶³

(2) Miscellaneous Contractual Aspects

Under s. 4A-305, the failure to execute a transfer order, an execution that takes place after the execution date, or late payment or notice of payment to the beneficiary may be excused “if the receiver proves that the failure or delay was caused by . . . circumstances beyond [its] control . . . and [it] exercised such diligence as the circumstances required”. A non-exhaustive list of “circumstances beyond the control of the receiver” includes “interruption of communication facilities or equipment failure not involving a lack of ordinary care by the receiver, suspension of payments by another bank,¹⁶⁴ war, [and] emergency conditions”.¹⁶⁵

¹⁶¹ But such liability is not absolute. See s. 4A-205(1)(d) and (2), dealt with, *supra*, in the text around footnotes 111 to 115, and s. 4A-305, discussed, *infra*, in Part 3(2).

¹⁶² See s. 4A-307(3) discussed, *infra*, in Part 3(2).

¹⁶³ Compare in general with Introduction (2).

¹⁶⁴ Under UCC 4-104(1)(k), explicitly adopted by reference in s. 4A-103(4),

“Suspends payments” with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over or that it ceases or refuses to make payments in the ordinary course of business.

The provision is drafted against the normal expectation of a sender for a same-day service.¹⁶⁶ Delay may also be excused by agreement¹⁶⁷ providing for a lower standard of service.¹⁶⁸ In the absence of either such an agreement or a timely rejection, the section may be invoked by a transmitting bank that accepted a transfer order pursuant to s. 4A-205(1)(d), that is, by allowing midnight of the execution date to pass while having at its disposal covering funds.¹⁶⁹ Such a transmitting bank is then liable under s. 4A-304(1)(c), except that it may then be discharged under s. 4A-305.

One aspect of s. 4A-305 may not have been thought through fully. Thus, under s. 4A-207(1), a transmitting bank executing a transfer order assumes the risk of variations between the terms of the order as sent and received through a communication system.¹⁷⁰ It is hard to see why such a bank may be excused under s. 4A-305 for delays resulting from "interruption of communication facilities or equipment failure" and not for variations occurring in the course of communication breakdown.

Section 4A-306 deals with the authority of a receiver to charge its customer's¹⁷¹ account¹⁷² with the amount of the latter's transfer order that has been accepted by the former. Subsection (1) provides for the receiver's right to do so, but not before execution or value date, depending on whether the receiver is a transmitting or destination bank. A properly made charge to the customer's account discharges its obligation as a sender, under s. 4A-302(2),

¹⁶⁵ The language of s. 4A-305 may be compared with that of UCC 4-108(2), dealing with the collection of cheques (and other paper-based debit items):

Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this Act or by instructions is excused if caused by interruption of communication facilities, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the bank provided it exercises such diligence as the circumstances require.

¹⁶⁶ See Comment to 4A-305.

¹⁶⁷ See s. 4A-304(1)(b) and (c).

¹⁶⁸ See Comment to s. 4A-305.

¹⁶⁹ And the fulfillment of all other requirements enumerated in subsecs. (1)(d) and (2) of s. 4A-205. See discussion, *supra*, in text around footnotes 111 to 115.

¹⁷⁰ See in general Part 2(4), and text around footnote 129.

¹⁷¹ See definition quoted, *supra*, in footnote 64.

¹⁷² Under UCC 4-104(1)(a), explicitly adopted by reference by s. 4A-103(4), "'Account' means any account with a bank and includes a checking, time, interest or savings account."

to pay to the receiver the amount of the order that has been accepted by the receiver.¹⁷³

Subsection (2) governs the situation where the customer's account has insufficient funds to cover all incoming transfer orders and items¹⁷⁴ payable from the account. In such a case, "the receiver may charge the customer's account with respect to the various items and transfer orders in any sequence convenient to the receiver." It is not required to consider the competing items and transfer orders in any particular order.¹⁷⁵

Rules governing the measure of damages for breach of obligations under Article 4A are provided for in s. 4A-307. Different standards apply to various situations. These rules can be summarized as follows:

- (1) By failing either to give the beneficiary a timely notice of receipt of a transfer order or to make a timely payment, the destination bank¹⁷⁶ becomes liable to the beneficiary "for damages limited to compensation for the beneficiary's expenses . . . interest losses, and other incidental damages". Where payment is not made by the destination bank "within a reasonable time after demand" of the beneficiary, exposure increases to "damages, including consequential damages, proximately caused by the refusal to pay". The destination bank may avoid this liability if it proves that its refusal stemmed from "a reasonable doubt concerning the right of the beneficiary to payment".
- (2) The receiving transmitting bank's breach of the warranty under s. 4A-304(1)(a), relating to the acceptance by the destination bank of the transfer's order carrying out the sender's instructions,¹⁷⁷ either excuses the sender from paying the receiver the amount of the transfer order, or if it has already paid,¹⁷⁸ it is entitled to recover from the receiver "the amount paid plus interest from the date of payment". No liability for

¹⁷³ Discussed, *supra*, in Part 3(1). See Comment 1 to s. 4A-306.

¹⁷⁴ Under UCC 4-104(1)(g), adopted by reference by s. 4A-103(4), "'Item' means any instrument for the payment of money even though it is not negotiable but does not include money."

¹⁷⁵ See Comment 2 to s. 4A-306. Cf. UCC 4-303(2), providing that subject to rules relating to creditor process, "items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank."

¹⁷⁶ That is, in breach of s. 4A-303, discussed, *supra*, in Part 3(1).

¹⁷⁷ See, *supra*, Part 3(1).

¹⁷⁸ As provided in s. 4A-302(2), discussed, *supra*, in Part 3(1).

damages is fastened on the receiver for breach of that warranty.

- (3) A transmitting bank, either (i) breaking its undertakings under s. 4A-304(1)(b) and (c), relating to compliance with the sender's instructions and to the timely execution of its transfer order, or (ii) breaking a contractual undertaking to accept the sender's transfer order,¹⁷⁹ is liable for "damages limited to compensation for the injured party's expenses . . . interest losses, and other incidental damages". Consequential damages, if proximately caused, may be recovered only in exceptional circumstances where "liability is based on conduct by the receiver in malicious disregard of the rights of the injured party."

Section 4A-307 rejects the rule of *Evra Corp. v. Swiss Bank Corp.*,¹⁸⁰ acknowledged by Comment 3 to be "[t]he leading common law case on the subject of consequential damage". In that case, an intermediary transmitting bank failed to execute in a timely manner a transfer order for \$27,000. Consequently, the beneficiary did not receive timely payment and repudiated its contract with the sending customer. The lower court¹⁸¹ held that the intermediary transmitting bank was liable for consequential loss on the basis of breach of contract and negligence. It awarded the sending customer \$2.1 million for lost profits under the contract repudiated by the beneficiary. The Seventh Circuit¹⁸² reversed on the basis of remoteness of damage. Under the particular circumstances of the case, the loss was unforeseeable since the intermediary transmitting bank had not been put on notice of the special circumstances of the case. This left open the possibility of bank liability for consequential loss where circumstances are known.

Comment 3 explicitly rejects *Evra*, finding it to be "not a practical statutory solution to the problem of bank liability for consequential damages". One troublesome aspect of *Evra* is the uncertainty as to the amount of knowledge to be acquired by a

¹⁷⁹ In the latter case (no. (ii)), "there is no liability under Section 4A-304 because there was no acceptance, but there is liability for breach of the contract to accept." See Comment 3.

¹⁸⁰ 522 F. Supp. 820 (N.D. Ill, 1981), revd 673 F. 2d 951 (7th Cir., 1982), *cert. denied* 103 S. Ct. 377 (1983).

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

bank before it becomes exposed to unlimited liability. But in the final analysis, it was feared that the adoption of "the *Evra* rule" would compromise two essential aspects of the modern wire transfer system, that is, speed and low cost. The burden of timing payments and confirming their execution was explicitly put on the sending customer.¹⁸³

(3) Payment

The fulfillment of the respective payment obligations of participants in a payment transaction is dealt with in various sections in Article 4A.

Section 4A-308 deals with payment by the sending customer to the beneficiary and the resulting discharge of the underlying obligation. Comment 1 to s. 4A-308 regards subsec. (1) as stating "the fundamental rule of Article 4A". Under this subsection

a sending customer pays the beneficiary of a transfer order issued by the sending customer at the time and in the amount that a transfer order for the benefit of the beneficiary is accepted by the destination bank in the payment transaction.

Since acceptance by the destination bank generates its undertaking to the beneficiary,¹⁸⁴ subsec. (1) in effect states that "a wire transfer is accomplished by providing to the beneficiary the obligation of the destination bank to pay the amount of the transfer order."¹⁸⁵

This time of payment is however stated by subsec. (1) to be subject to s. 4A-206(3) governing revocation of a mistaken transfer order that has been accepted by the destination bank, s. 4A-207 governing erroneous contents of transfer orders,¹⁸⁶ and s. 4A-309(4) and (5) dealing with the failure of a transmitting bank.¹⁸⁷

Under s. 4A-308(2), where a payment under s. 4A-308(1) is made to satisfy an obligation, "the obligation is [normally]¹⁸⁸

¹⁸³ Comment 3 to s. 4A-307. Needless to say, from the sending customer's viewpoint this is not a desirable solution. It overlooks cash management considerations and is over-optimistic as to the sending customer's ability to be in control of the situation. Furthermore, in practical terms, no consequential damages under subsec. (3) means no damages at all (except for refund of bank charges and interest).

¹⁸⁴ See, *supra*, Part 3(1).

¹⁸⁵ Comment 1 to s. 4A-308.

¹⁸⁶ Sections 4A-206 to 207 are discussed, *supra*, in Part 2(4).

¹⁸⁷ Section 4A-309 is discussed, *infra*, in Part 3(4).

¹⁸⁸ The exceptions are set out below.

discharged to the same extent that discharge would result from payment to the beneficiary of the same amount in money.” It seems however that notwithstanding the Comment, the point is not so much “to substitute the obligation of the destination bank for the obligation of the sending customer” by analogy to the effect of payment by means of a cashier’s cheque¹⁸⁹ under UCC 3-802(1)(a).¹⁹⁰ Rather, the combined effect of s. 4A-308(1) and (2) is to treat payment by wire transfer as the equivalent of payment by means of a deposit made by the sending customer into the beneficiary’s bank account.¹⁹¹

Section 4A-308 settles a major uncertainty in wire transfers law. In their search for “finality of payment”, courts focused on various points in the payment process, such as the receipt of the transfer order by the destination bank, the destination bank’s decision to credit the beneficiary’s account or the actual credit posted to the account, the communication of the advice of credit to the beneficiary, and the irreversibility of the credit posted to the beneficiary’s account.¹⁹² Judicial efforts failed to reach a uniform rule.¹⁹³ The uncertainty is removed and the controversy is eliminated by Article 4A which selects the acceptance by the destination bank as the crucial point. It is noteworthy that so far as the sending customer is concerned, “irrevocability” is determined by the “execution” of the transfer order by the originating bank,¹⁹⁴ while “payment” is made at a later stage, upon the “acceptance” by the destination bank. Except for in a “book transfer”, “revocability” is thus lost prior to “payment” being made.¹⁹⁵

¹⁸⁹ That is, a bill drawn by a commercial bank on itself. Under Canadian banking terminology, this is the same as bank draft.

¹⁹⁰ This provides that “Unless otherwise agreed where an instrument is taken for an underlying obligation . . . the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor”.

¹⁹¹ The cashier’s cheque analogy is quite weak since the bank liable thereunder is in a similar position to that of the sending customer’s bank, and not the beneficiary’s bank, as it is in a wire transfer.

¹⁹² Leading authorities include *The Brimnes, Tenax Steamship Co. Ltd. v. The Brimnes (Owners)*, [1974] 3 All E.R. 88 (C.A.); *Momm v. Barclays Bank Int’l Ltd.*, [1977] Q.B. 790; *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corp. of Liberia (The “Laconia”)*, [1977] A.C. 850 (H.L.); and *A/S Awilco v. Fulvia S.p.A. di Navigazione (The “Chikuma”)*, [1981] 1 All E.R. 652 (H.L.).

¹⁹³ See in general, Introduction (2), *supra*.

¹⁹⁴ Under s. 4A-206(1), discussed, *supra*, around footnotes 118-122.

¹⁹⁵ This indeed underlies Ellinger’s efforts to reconcile existing case law. See the paragraph, *supra*, containing footnotes 38 and 39.

Section 4A-308(2) is premised on the assumption that contracting parties are likely to agree to payment by way of a wire transfer, so that unless expressly prohibited by contract as a means of payment, a transfer order accepted by the destination bank results in the discharge of the underlying obligation.¹⁹⁶ At the same time, the provision explicitly states that no discharge of the sending customer's underlying obligation to the beneficiary is achieved by means of payment under s. 4A-308(1) where (i) such means of payment was prohibited by contract, (ii) payment was refused by the beneficiary "within a reasonable time after receiving notice of receipt of the transfer order by the destination bank", (iii) pertaining funds have not been withdrawn by the beneficiary or applied to his debt, *and* (iv) the beneficiary would incur loss that could reasonably have been avoided if payment had been made by means that complied with the contract. The example provided by Comment 3 to such circumstances involves a beneficiary's contract requiring sending customer's payment by a cashier's cheque of Bank A. Instead, the sending customer paid by means of a wire transfer to the beneficiary's account to Bank B. Following acceptance by Bank B but prior to a reasonable opportunity for withdrawal by the beneficiary, Bank B failed. The sending customer's underlying obligation is not discharged since he cannot impose the risk of Bank B's insolvency on a beneficiary that specified another means of payment that did not entail that risk. Of course, one must presuppose that the cashier's cheque would not have been collected by the beneficiary through its bank account with Bank B.

Section 4A-308(2) does not cover the entire scope of the beneficiary's right to refuse payment accepted for him by the destination bank. The point is highlighted by reference to the decision of the House of Lords in *The Laconia*.¹⁹⁷ In that case the destination bank accepted a transfer order in payment made by the sending customer to the beneficiary. Payment was made out of time under the terms of the contract between the sending customer and the beneficiary. Acceptance would have deprived the beneficiary of his right to repudiate the contract on the basis of the sending customer's breach. The beneficiary was notified of the payment shortly after the receipt of the transfer order by the destination

¹⁹⁶ See Comment 2 to s. 4A-308.

¹⁹⁷ *Supra*, footnote 192.

bank. It promptly advised the destination bank of its rejection and was allowed by the House of Lords to refuse payment. In that case, payment was not made by the sending customer "by a means prohibited by the contract" and hence the circumstances allowing the beneficiary to refuse payment under s. 4A-308(2) would not have been applied. It is unfortunate that Article 4A does not provide guidance as to the scope of the beneficiary's rejection rights under circumstances such as dealt with in *The Laconia*. However, it is submitted that s. 4A-308(2), speaking of the discharge of the underlying obligation by payment, should not be taken to eliminate altogether the beneficiary's rejection rights. In any event, payment may be made not in discharge of any subsisting obligation. Sound policies require that the beneficiary be conferred the power to reject such payments.

Payment by the destination bank to the beneficiary is governed by s. 4A-303(3). Such payment is made in satisfaction of the destination bank's obligation under s. 4A-303(2).¹⁹⁸ Where the destination bank credits an account of the beneficiary with respect to a transfer order accepted by the destination bank,

payment by the destination bank to the beneficiary occurs when and to the extent that the beneficiary is given the right to withdraw the credit or the destination bank applies the credit to a debt of the beneficiary.

The beneficiary's right to withdraw funds credited to his account must be unconditional and withdrawn funds are not to be recoverable, unless "payment was made by mistake and the beneficiary is not entitled to receive or retain the payment under the law governing mistake and restitution", or except for in connection with circumstances provided for under s. 4A-309(4) and (5) governing the failure of a transmitting bank. Payment into the beneficiary's bank account can however be made otherwise than by releasing funds to the beneficiary. Rather, the resulting credit in the beneficiary's account can be applied to a debt of the beneficiary, either to the destination bank exercising its setoff right, or to a third party garnishor.¹⁹⁹

According to s. 4A-303(5), where the destination bank pays directly to the beneficiary, rather than into its bank account, time of payment is determined under general principles of law, outside Article 4A. Comment 6 to s. 4A-303 explains that this applies "to

¹⁹⁸ Discussed, *supra*, in Part 3(1).

¹⁹⁹ See Comment 3 to s. 4A-303.

the uncommon cases in which the beneficiary does not have an account with the destination bank". In such circumstances, the destination bank may pay the beneficiary by a means specified in the order of "any other commercially reasonable means". Payment should be remitted, or notice be given, by the destination bank to the beneficiary "before midnight of the day following the day of acceptance".²⁰⁰

Payment by a sender to a receiver is governed by s. 4A-302(3). Such payment satisfies the sender's engagement under s. 4A-302(2) providing for the sender's obligation to pay the receiver the amount of a transfer order accepted by the receiver.²⁰¹ Subsection (3) of s. 4A-302 provides for the following rules:

- (i) Payment to a receiving bank by a sending bank may occur when credit to the former's account with the latter "becomes withdrawable by the receiver", provided that "the sender's obligation is not settled through the Federal Reserve System."
- (ii) Where the sender is a bank and the sender's obligation is settled through the Federal Reserve System, the sender's payment occurs "when the receiver receives final settlement of the obligation". This applies to FedWire transfers. It also applies to a wire transfer system such as CHIPS,²⁰² providing for a settlement service premised on the netting of daily interbank transfers, and the settlement of resulting amounts owed by net debtor banks to net creditor banks by means of a FedWire transfer from each net debtor bank into a special account. This is then followed by a FedWire transfer from the special account to each net creditor bank.²⁰³
- (iii) Where the sender is not a bank, or is a bank that does not settle through the Federal Reserve System,²⁰⁴ and the receiver charged an account of the sender with the receiver with respect to the transfer order, the sender's payment to the receiver occurs "when the charge becomes final". With respect to a receiver which is a destination bank, the charge becomes final "when the receiver accepts the sender's order". With respect to a receiver which is a transmitting bank, the charge becomes

²⁰⁰ Section 4A-303(5).

²⁰¹ See in general, Part 3(1), *supra*.

²⁰² For CHIPS settlement, see B. Geva, "CHIPS Transfer of Funds", forthcoming in J. Int. Banking L. (U.K.).

²⁰³ Comment 3 to s. 4A-302.

²⁰⁴ Comment 5 to s. 4A-302.

final as soon as the receiver executes the sender's order and pays its own transfer order. Accordingly, "[f]inality is defined as occurring when the payment transaction is completed".²⁰⁵ This rule governs the relationship between the sending customer and the originating bank,²⁰⁶ and any interbank transfer settled through a correspondent account of the sender with the receiver.

- (iv) In other situations, payment "is governed by applicable principles of law that determine when an obligation is satisfied". This applies to a sending customer paying over the counter for a transfer order to be issued to a receiver, or more in general, "to the uncommon cases in which the sender doesn't have an account with the receiver or doesn't settle through the Federal Reserve System".²⁰⁷

(4) Failure of a Bank Sender

Section 4A-309 governs the allocation of the risk of loss incurred in the event of the suspension of payment by a bank sender. The rules provided by it "are designed to cause the least amount of commercial disruption".²⁰⁸ Under subsec. (2), the section applies to a payment transaction in which there is a "failed bank", defined in subsec. (1)(a) as a "bank sender" that suspended payments²⁰⁹ while its obligation under s. 4A-302(2)²¹⁰ was unpaid, and the destination bank has accepted a transfer order that results in payment from the sending customer to the beneficiary under s. 4A-308(1).²¹¹ Under subsec. (1)(b) a "bank sender" is "a sender that is a bank", *i.e.*, either a transmitting bank or a bank sending customer.

In the absence of any statutory rule, the receiver from the failing bank bears the loss, at least initially. Whether this receiver can shift the loss to the subsequent receiver in the payment transaction, all the way up to the beneficiary, by arguing that the transmission of funds in a payment transaction is conditional on each receiver being paid, has not been determined by case law.

²⁰⁵ *Ibid.*

²⁰⁶ An undefined term, denoting the first transmitting bank, that is, the sending customer's bank. See, *supra*, text at footnote 68.

²⁰⁷ Comment 6 to s. 4A-302.

²⁰⁸ Comment 2 to s. 4A-309.

²⁰⁹ Definition of "suspends payment" in UCC 4-104(1)(k), is explicitly adopted by reference in s. 4A-103(3), and is reproduced, *supra*, in footnote 164.

²¹⁰ Discussed, *supra*, in Part 3(1).

²¹¹ Discussed, *supra*, in Part 3(3).

Section 4A-309 purports to present a pragmatic scheme, unfettered by doctrinal considerations. Its first objective is to carry out the payment transaction while avoiding any loss caused by a transmitting bank's failure. However, if a sender has prepaid the failed bank, the loss may be allocated to it.

Subsection (3) states the basic rule of s. 4A-309. It applies only where the failed bank is an intermediary transmitting bank, that is, it is neither a bank sending customer nor the originating bank,²¹² and where the insolvency proceedings of the failed bank are governed by domestic American laws. Under subsec. (3), a failed bank is excused from its obligation under s. 4A-302(2)²¹³ to pay the receiver that accepted the failed bank's transfer order. It also loses the benefit of its sender's payment obligation under s. 4A-301(2). On its part, "[t]he bank sender, if it has not suspended payments, is obliged to pay the amount of its transfer order to the next receiver in the payment transaction that is not a failed bank."²¹⁴

In other words, the sender's payment obligation under s. 4A-302(2), shifts from its receiver, that is the failed transmitting bank, to the subsequent receiver, that is "the next receiver in the payment transaction". Likewise, the subsequent receiver's right to payment under s. 4A-302(2) shifts from its sender, that is the failed transmitting bank, to the sender of the transfer order to the failed bank. The failed bank, being merely a conduit in passing the funds to the destination bank, is simply removed from the chain.²¹⁵ Its liability is excused and its right is forfeited.

This rule is designed to provide a mechanism for getting payment to the destination bank without the failed bank. It reflects the underlying principle of Article 4A under which the essential role of each transmitting bank is not to pay, but rather to issue a transfer order. It is the destination bank's obligation to the beneficiary, arising upon this bank's acceptance of its sender's transfer order, that constitutes the sending customer's payment to the beneficiary. Payment by a transmitting bank of its obligation to a receiver that accepts its order is not essential to the completion of the wire transfer.²¹⁶ Hence, where a transmitting bank fails, the

²¹² Cf. text which follows footnote 211, and around footnote 68.

²¹³ Discussed, *supra*, in Part 3(1).

²¹⁴ According to Comment 4, the requirement under which the "next receiver" to be paid must not be "a failed bank", is designed to cover "the case in which more than one bank is a failed bank in the payment transaction".

²¹⁵ See Comment 3.

²¹⁶ *Ibid.*

objective of completing payment can best be accomplished by removing the failed bank altogether from the transmission chain.

Where the failed bank has not been prepaid by its sender, its "removal" under subsec. (3) results in loss avoidance. The obligations owed to and by the failing bank set off each other. The payment transaction is carried out as if the failed bank has not been part of the chain and participants' respective liabilities are adjusted accordingly. At the same time, a sender of a transfer order issued to a failed bank which prepaid²¹⁷ its obligation under s. 4A-302 bears the loss incurred by virtue of the bank failure. This is so since the prepaying sender is not relieved under subsec. (3) from the obligation to pay the subsequent receiver.

In situations not governed by subsec. (3), subsec. (4) allows the destination bank to revoke its acceptance of the transfer order, under the following conditions:

- (1) The destination bank did not receive payment of the order,
- (2) The destination bank paid the beneficiary pursuant to an agreement "giving the destination bank the right to recover the amount paid to the beneficiary because of the failure to receive payment", and
- (3) The destination bank accepted a transfer order either "issued by the failed bank", or "with respect to which it is not entitled to payment because the failed bank failed to pay the transfer order".²¹⁸

According to Comment 7, subsec. (4) covers three types of cases: first, cases in which the failed bank is the originating bank that executed the transfer order of a non-bank customer; secondly, cases in which the failed bank is a bank sending customer; and thirdly, cases in which the insolvency of the failed bank is not governed by domestic American laws.²¹⁹

Under subsec. (5), revocation of acceptance ought to be made by the destination bank by notice to the beneficiary. Notice must be given "before the close of the wire transfer business day of the destination bank following the day the failed bank suspended

²¹⁷ When "prepayment" occurs is determined according to s. 4A-302(3), discussed, *supra*, in Part 3(3). See Comment 6 to s. 4A-309.

²¹⁸ The latter involves a case in which a solvent receiver situated in the transmission chain between the failing bank and the destination bank issues its transfer order to the destination bank under an agreement which relieves it from payment when it fails to receive payment from the failed bank. See Comment 7, last paragraph.

²¹⁹ Compare with text, *supra*, around footnote 212.

payment". Revocation allows the destination bank to recover payment from the beneficiary under the terms of their agreement.

Revocation of acceptance results in treating the transfer order "as never having been accepted". Accordingly, the sending customer's obligation in the underlying transaction has not been discharged under s. 4A-308(2).²²⁰ Likewise each sender is relieved from its payment obligation under s. 4A-302(2), the latter being excused by the breach of warranty under s. 4A-304(1)(a).²²¹ The overall effect is thus to "unwind" the transaction, or to treat it as "an attempted transfer that was not completed".²²² Under those circumstances, the sender which has prepaid the failed bank is to bear the loss. Where no prepaying sender is involved, loss is avoided altogether. This does not take into account the impact of the failure to complete a timely payment on the contractual relationship between the sending customer and the beneficiary.

In general, "finality of payment" policy is best carried out by a rule providing for a destination bank's guaranty of payment to the beneficiary. Inasmuch as s. 4A-309 does not allocate the loss of a sender bank failure to the beneficiary and restricts the right of the destination bank to revoke its acceptance and recover from the beneficiary, the provision appears to be consistent with "finality of payment" policy.²²³ At the same time, by insulating the destination bank from loss incurred by a sender bank failure, s. 4A-309 appears to undermine this "finality of payment" policy. However, the procedure of bypassing the failed bank under subsec. (3) militates against the latter conclusion. Indeed, the principal policy underlying s. 4A-309, that of payment completion, is quite consistent with "finality of payment".

In turn, the rule allocating prepayment loss to the prepaying sender is generally quite defensible. Indeed, as acknowledged by

²²⁰ Discussed, *supra*, in Part 3(3).

²²¹ Discussed, *supra*, in Part 3(1).

²²² See Comment 7, middle paragraph.

²²³ A Previous Draft did not allow the destination bank to revoke acceptance where the failed bank was a "bank designated by the destination bank or beneficiary". However, the destination bank could then recover payment from the beneficiary if such course of action had been authorized under the terms of their agreement. In such a case, the beneficiary was subrogated to the destination bank's claim against the failed bank. In permitting recovery from the beneficiary, the rule undermined finality of payment. Much can be said however in favour of a rule allocating to the destination bank loss resulting from the failure of a correspondent bank selected by it. Such a rule may encourage prudence in selecting an intermediary.

the Comment, there is no principled basis for choosing between the prepaying sender and the subsequent receiver; both gave credit to the intermediary failed bank.²²⁴ Nevertheless, the decision not to prepay or even send a transfer order to a bank on credit risk grounds may be easier than the decision not to accept a bank's transfer order on credit grounds. Hence, it may be marginally more defensible to have the prepaying sender rather than the subsequent receiver bear the risk of the intermediary's failure, as indeed provided in s. 4A-309. But when the prepaying sender is a non-bank sending customer, policy considerations may be more equivocal. On one hand, subject to deposit insurance, the risk of failure by a bank holding a customer's deposit is a normal risk run by such a customer. On the other hand, inasmuch as the transmittal of transfer orders has been completed, so that prior to its failure the failed bank allowed the sending customer to "withdraw" the sum of payment from the deposit, it might be fairer not to allow banks to shift the loss back to the sending customer, but rather to leave it with the receiver from the failing bank.

Where the destination bank is allowed to revoke its acceptance, finality of payment is sacrificed, albeit with the goal of avoiding delays in acceptance by the destination bank or even outright rejections by it. Arguably, by allowing the destination bank to be relatively uncritical in accepting transfer orders, the policy of encouraging speedy implementation of payment transactions is thereby enhanced.

Conclusion

The major accomplishment of Article 4A is the introduction of uniform terminology and certainty as to the basic liabilities of parties to a payment transaction. The certainty relates to scope of liabilities, delineation of entitlements, and determination of the timings of such liabilities and entitlements. In that regard, while not being flawless, Draft Article 4A is model law for payment by wire transfer.

²²⁴ See Comment 6.